

No. 13094

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United States  
Court of Appeals  
For the Ninth Circuit.

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ANTONE PAGLIERO and ARTHUR PAG-  
LIERO,

Appellants,

vs.

WALLACE CHINA CO., LTD., a Corporation,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

FILED

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PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK



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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit of Clifford, Stephen J.....	51
Ex. No. 9—Representation of China	
“Tweed” Sold by Plaintiff...	56
10—Representation of China	
“Tweed” Sold by Defendants	57
11—Representation of China “Hi- biscus” Sold by Plaintiff....	58
12—Representation of China “Hi- biscus” Sold by Defendant...	59
13—Representation of China	
“Magnolia” Sold by Plaintiff	60
14—Representation of China	
“Magnolia” Sold by Defend- ants .....	61
Affidavit of Delany, James R. ....	45
Affidavit of Pagliero, Antone A. ....	74
Affidavit of Pagliero, Antone Re Pyramid Alloy Manufacturing Co. ....	64
Ex. A—Letter From Pyramid Alloy Man- ufacturing Co. ....	66
Affidavit of Pagliero, Arthur .....	68

INDEX	PAGE
Affidavit of Robertson, Harold K. ....	35
Affidavit of Stein, Oscar .....	33
Affidavit of Wood, Kenneth O. ....	37
Certificate of Clerk to Record on Appeal .....	141
Certificate of Clerk to Supplemental Record on Appeal .....	142
Complaint .....	3
Ex. No. 1—Pattern Transfer “Shadow- leaf” .....	12
2—Imitation of Ex. No. 1 “Shad- owleaf” .....	13
3—Plate Manufactured and Sold by Plaintiff Under the Name “Shadowleaf” .....	14
4—Plate Manufactured and Sold by Defendants Under the Name “Shadowleaf” .....	15
5—Photostat of Plaintiff’s Carton Used in Shipping “Shadow- leaf” China .....	16
6—Photostat of Defendants’ Car- ton Used in Shipping the Imi- tation .....	17
7-A—Price Lists of Defendants..	18
7-B—Price Lists of Defendants..	19

## INDEX

## PAGE

Concise Statement of Points Upon Which Appellants Intend to Rely .....	144
Deposit in Lieu of Supersedeas Bond .....	94
Findings of Fact and Conclusions of Law ....	83
Judgment .....	89
Motion for Preliminary Injunction .....	21
Affidavit of Elster, Sidney .....	24
Ex. No. 8—Front Page of One Direct Mail Circular .....	31
Motion for Supersedeas and Stay of Execution Pending Appeal .....	93
Names and Addresses of Attorneys .....	1
Notice of Appeal .....	92
Order of June 7, 1951 Re Pyramid Alloy Mfg. Co. ....	82
Order of June 7, 1951 Granting Motion for Preliminary Injunction .....	82
Order Granting Supersedeas .....	93
Order to Show Cause .....	63
Reporter's Transcript—Order to Show Cause June 7, 1951 .....	97

## INDEX

## PAGE

## Witness, Defendants':

## Messerschmitt, Dale J.

—direct .....	120
—cross .....	122
—redirect .....	127

Stipulation Designating Exhibits to Be Physical Exhibits for the Record on Appeal.....	146
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In the United States District Court, Northern  
District of California, Southern Division

No. 30595

WALLACE CHINA CO., LTD.,

Plaintiff,

vs.

ANTONE PAGLIERO, ARTHUR PAGLIERO,  
and JOHN PAGLIERO, Doing Business as  
TECHNICAL PORCELAIN & CHINA-  
WARE CO. and ANTONE PAGLIERO,  
MARY JEAN PAGLIERO and DELINA  
PAGLIERO, Doing Business as PYRAMID  
ALLOY MANUFACTURING CO.,

Defendants.

## COMPLAINT FOR UNFAIR COMPETITION AND TRADE-MARK INFRINGEMENT

Comes Now the plaintiff with its complaint and  
alleges as follows:

1. Plaintiff Wallace China Co., Ltd., is a corporation organized and existing under and by virtue of the laws of the State of California and has an established place of business at Huntington Park, Vernon, County of Los Angeles, California, adjacent the city of Los Angeles.

2. Defendants Antone Pagliero, Arthur Pagliero and John Pagliero are residents of the Northern District of California and general partners doing business as Technical Porcelain & Chinaware

Co. with an established office and plant at 6416 Manila Avenue, El Cerrito, Contra Costa County, State of California. Plaintiff alleges, on information and belief, that defendants Antone Pagliero, Mary Jean Pagliero and Delina Pagliero are partners doing business at the same location under the name and style Pyramid Alloy Manufacturing Co.

3. This is an action for infringement of trademarks and for unfair competition and the amount in controversy exceeds Three Thousand Dollars (\$3,000.00); this Court has jurisdiction under the provisions of the Lanham Trade-Mark Act of July 5, 1946, 15 U.S.C.A. §§1051-1127 and 28 U.S.C.A. §§1337 and 1338.

4. For over twenty years last past, plaintiff corporation has been and still is engaged in the manufacture and sale of vitrified hotel china throughout the western part of the United States of America and the territory of Hawaii; plaintiff alleges that about forty per cent of its products are shipped in interstate commerce, and that it has over fifty established dealers for its vitrified hotel china throughout California and in other states, including Oregon, Washington, Utah, Oklahoma, Kansas, Louisiana, Georgia and Texas.

5. Plaintiff corporation, by the exercise of much effort and judgment and the expenditure of large sums of money for technical assistance, supervision, equipment and materials, and the exercise of great care in the preparation of clays and ingredients entering into the manufacture of vitrified hotel

china, the selection and use of specialized equipment for forming and burning the china, the compounding of glazes, and the inspection and packaging of the china, has manufactured and extensively sold vitrified china of high durability and quality to many dealers and purchasers. Plaintiff corporation has employed artists to create and design new, unique and original patterns and developed distinctive patterns and methods of reproducing them on china, said patterns imparting attractiveness, desirability and sales appeal to the china manufactured by plaintiff.

6. Plaintiff alleges that it used and is using distinctive trade names or trade-marks to indicate the nature, quality, and source of its china; that among trade names so appropriated and used by plaintiff are "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia"; that plaintiff uses the said trade names in connection with its china bearing distinctive patterns and applies said trade names to containers in which said china is shipped and sold (in interstate and intrastate commerce); that said trade names have been extensively used and are used in catalogs and advertising matter published by plaintiff and its dealers.

7. Plaintiff alleges that by reason of the expenditure of its effort, time and money and the high quality and durability of plaintiff's china, and the distinctive and attractive appearance thereof, due to the original patterns employed and the wide distribution of the china, plaintiff's china has become

popular and has engendered a large and valuable good will and a high reputation; that the appearance of plaintiff's china, by reason of the attractive and distinctive patterns, is recognized by the purchasing trade as representing high quality china originating with plaintiff. Plaintiff has expended much time and effort through its salesmen and representatives and by advertising and exhibiting the china bearing said distinctive patterns in building up and acquiring a demand for said china and a good will therein. That Exhibit 1, attached hereto, is a pattern transfer originated by plaintiff and known by the trade name "Shadowleaf," said pattern being used by plaintiff on its china.

8. Plaintiff alleges that the various trade names and each of them appropriated and used by plaintiff have acquired and represent a large and valuable good will and high reputation and are associated with and recognized by the purchasing trade as representing china originating with plaintiff and bearing said distinctive patterns; that plaintiff's customers and the purchasing public ask for china by trade name and expect to get china manufactured by plaintiff and bearing plaintiff's designs.

9. Plaintiff alleges that defendants have engaged in a premeditated, perfidious and willful course of conduct designed to destroy the good will, reputation and business of plaintiff and its trade-marks and patterns by copying said distinctive patterns originated and popularized by plaintiff and by using the trade names first appropriated and used by



plaintiff. Plaintiff alleges that defendants have conspired with the engraver (Garnier Engraving Co. of Los Angeles, California), formerly taught and trained by plaintiff in the preparation of rollers for the production of pattern transfers, and have willfully, deliberately and surreptitiously had such engraver make rollers for and on behalf of defendants, which rollers are a copy of plaintiff's rollers and defendants have used and are now using such copied rollers in making copies of plaintiff's patterns; that Exhibit 2 attached hereto and made a part of this verified complaint is a pattern transfer made by defendants in slavish imitation of plaintiff's pattern Exhibit 1, by the copied rollers and used by defendants upon china sold by defendants in interstate and intrastate commerce and in competition with plaintiff; that defendants have copied various of plaintiff's original patterns, including the patterns known by trade names "Shadowleaf," "Tweed," "Hibiscus," and "Magnolia," have applied said copied patterns to china and have sold and are selling said china to the great damage and injury to plaintiff and its reputation, good will and business. Plaintiff alleges that the china sold by defendants bears a willful, deceptive copy of plaintiff's original patterns and is a fraud upon the purchasing public, and alleges that Exhibit 3 attached hereto is a plate manufactured and sold by plaintiff under the name "Shadowleaf" and that Exhibit 4 attached hereto is a plate manufactured and sold by defendants under the name "Shadowleaf."

10. Plaintiff alleges that defendants have been and are selling, offering for sale and advertising china bearing copies of plaintiff's distinctive patterns under plaintiff's trade names in California and elsewhere. Plaintiff alleges that Exhibits 7a and 7b attached hereto are copies of price lists distributed by defendants offering china under plaintiff's trade names "Tweed," "Shadowleaf" and "Hibiscus." Plaintiff further alleges that as a part of their plan to appropriate the good will and business of plaintiff and to deceive the purchasers into purchasing defendants' china instead of plaintiff's china, defendants have copied the color, marking and arrangement of plaintiff's shipping cartons; that Exhibit 5 appended hereto is a photostat of one of plaintiff's cartons used in shipping "Shadowleaf" china; that Exhibit 6 attached hereto is a photostat of one of defendants' cartons used in shipping the imitation. Plaintiff alleges that by the acts herein complained of defendants deceive the public with respect to the nature, quality and source of the china and damage the plaintiff in its good will, reputation and business; that the sale by defendants of china bearing the copied patterns is a direct infringement of plaintiff's rights and the good will attached thereto and constitute unjust enrichment by defendants. That the acts of defendants complained of herein are related to and constitute a part of defendants' acts in infringing upon plaintiff's trade names and constitute unfair competition and an aggravation of damages to plaintiff.



11. Plaintiff alleges that the sale of china by defendants under the trade names first appropriated and used by plaintiff is calculated to deceive the public and constitutes a palming off of defendants' china as china of plaintiff, and by such sales defendants are appropriating to themselves the good will belonging to plaintiff; that by reason of the acts herein complained of defendants have made and are making it possible for defendants' dealers to commit a fraud upon the purchasing public.

12. All of the aforesaid acts of defendants are contrary to plaintiff's rights and contrary to commercial good faith and to the normal and honorable development of business activities. Defendants have been notified to cease such acts but continue to copy said patterns and to sell china under plaintiff's trade names and will continue to sell said infringing china and perform acts of unfair competition to the irreparable damage of plaintiff unless restrained by this Court. Plaintiff has already been damaged in an amount in excess of Twenty Thousand Dollars (\$20,000.00) and will continue to be damaged in an increasing amount from day to day unless defendants are enjoined and unless immediately restrained, defendants will completely and irreparably destroy and nullify plaintiff's good will and values owned by plaintiff.

Wherefore, plaintiff prays:

(1) That defendants and each of them, their agents, representatives, attorneys, servants and those acting in privity and concert with them, be

enjoined during the pendency of this action and permanently from infringing the rights of plaintiff in any manner and from making or causing to be made, selling, offering for sale, advertising, exhibiting, marketing or otherwise disposing of china bearing patterns deceptively similar to those originated by plaintiff or referred to or identified by plaintiff's trade names.

(2) That defendants and each of them be required to pay to plaintiff such damages as plaintiff has sustained in consequence of said unfair trade practices, unfair competition and trade-mark infringement, and to account for all gains, profits and advantages derived by defendants by the said practices and that such damages be trebled by reason of the willful, deliberate and wanton character of said acts of unfair competition.

(3) That defendants and each of them pay to plaintiff the cost of this action and reasonable attorneys' fees to be allowed to plaintiff by the Court.

(4) For such other and further relief as to this Court seems just and proper.

WALLACE CHINA CO., LTD.

By /s/ KENNETH O. WOOD,  
President.

/s/ C. A. MIKETTA,

NAYLOR & LASSAGNE,

By /s/ JAS. M. NAYLOR,  
Attorneys for Plaintiff.

State of California,  
County of Los Angeles—ss.

Kenneth O. Wood, being first duly sworn, states that he is president of Wallace China Co., Ltd., the corporation named as plaintiff in the above action; that he has read the foregoing complaint; that the same and every allegation thereof is true and correct to his own knowledge except as to those allegations made upon information and belief, and as to those allegations he believes them to be true.

/s/ KENNETH O. WOOD.

Subscribed and sworn to before me this 25th day of May, 1951.

[Seal]     /s/ MILDRED K. BADGER,  
Notary Public in and for the County and State  
above named.

**My Commission Expires Mar. 2, 1952.**







EXHIBIT 1





















**FROM**  
**WALLACE CHINA CO. LTD.**  
**HUNTINGTON PARK, CALIF**

**124**  
PKG. SLIP  
NO.

01961

**3** DOZ. **402** **Cream**

**7981**  
CUST. ORDER  
NO.

— DOZ. MUGS —

— DOZ. CUPS —

DEC. **Shadashief - E23-1B**



From TEPCO CHINA CO.  
EL CERRITO CALIFORNIA

CUST. ORDER  
NO.

PKG. SLIP  
NO.

485.  
3 DOZ. Eng. Med. Creams

~~DOZ~~ MUGS 85.

~~DOZ~~ CUPS                     

DEC. Shadow Tray Br...





Photos: Lardceps 5-0960 and 5-3051

TECHNICAL PORCELAIN & CHINA WARE CO.  
**ELSTER'S**  
El Cerro, California

BRANCH OFFICE AND WAREHOUSE  
223 South Los Angeles Street  
LOS ANGELES, CALIFORNIA  
Tucker 2764

**DISCOUNT SHEET**  
Effective December 1, 1947  
SUBJECT TO CHANGE WITHOUT NOTICE

All purchases from El Cerro Plant and Main Office 6416 Manila Street El Cerro Calif., will bear the following discount rates on Dec. 1, 1947 List Prices F.O.B. Plant.

Terms: 1% 10 Days; 30 Days Net; Interest 8% on Overdue Bal.

RED BAND		TAN BODY	
Plain Sunflow	White List Plus 10% 16%	Plain White	White List Plus 16%
Sunflow 61	Dec. List Less 30% 24%	L100 Rhinols	Dec. List Less 34%
Sunflow 62	Dec. List Less 14% 7%	L101 Marigolds	Dec. List Less 34%
Sunflow 63	Dec. List Less 14% 7%	L104 Green Band & Line	Dec. List Less 24-7%
Sunflow 64	Dec. List Less 14% 7%	L106 Blue Band & Line	Dec. List Less 24%
Sunflow 65	Dec. List Less 9% 7%	L107 Blue Band	Dec. List Less 24%
Sunflow 67	Dec. List Less 14% 7%	L108 Red Band	Dec. List Less 24%
Sunflow 68	Dec. List Less 14% 7%	L50	Dec. List Less 14%
Sunflow 69	Dec. List Less 14% 7%	L51	Dec. List Less 14%
" 70	" " " 14% 7%	L52	Dec. List Less 14%
		L60	Dec. List Less 14%
		L66	Dec. List Less 14%
		L53	Dec. List Less 14%

RED BAND		TAN BODY	
1/4 KIM	" " " 14% 7%	Mohawk	Dec. List Less 14%
		Tweed	Dec. List Less 14%
		Manarch	Dec. List Less 14%
		Dew Drop	Dec. List Less 14%
		Alpine	Dec. List Less 14%
		Modac	Dec. List Less 14%
WEST TRAV.	" " " 14% 7%		

Photos: Lardceps 5-0960 and 5-3051

TECHNICAL PORCELAIN & CHINA WARE CO.

El Cerro, California

BRANCH OFFICE AND WAREHOUSE  
223 South Los Angeles Street  
LOS ANGELES, CALIFORNIA  
Tucker 2764

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Terms: 1% 10 Days; 30 Days Net; Interest 8% on Overdue Bal.

BAMBOO		WHITE BODY	
Plain White	White List Plus 16%	White List Plus 16%	
L100 Rhinols	Dec. List Less 34%	Dec. List Less 34%	
L101 Marigolds	Dec. List Less 34%	Dec. List Less 34%	
L104 Green Band & Line	Dec. List Less 24-7%	Dec. List Less 24-7%	
L106 Blue Band & Line	Dec. List Less 24%	Dec. List Less 24%	
L107 Blue Band	Dec. List Less 24%	Dec. List Less 24%	
L108 Red Band	Dec. List Less 24%	Dec. List Less 24%	
L50	Dec. List Less 14%	Dec. List Less 14%	
L51	Dec. List Less 14%	Dec. List Less 14%	
L52	Dec. List Less 14%	Dec. List Less 14%	
L60	Dec. List Less 14%	Dec. List Less 14%	
L66	Dec. List Less 14%	Dec. List Less 14%	
L53	Dec. List Less 14%	Dec. List Less 14%	

BAMBOO		WHITE BODY	
1/4 KIM	" " " 14% 7%	Mohawk	Dec. List Less 14%
		Tweed	Dec. List Less 14%
		BALRO-8 Assorted Colors	Dec. List Less 14%
		Manarch	Dec. List Less 14%
		Dew Drop	Dec. List Less 14%
		Alpine	Dec. List Less 14%
		Modac	Dec. List Less 14%
WEST TRAV.	" " " 14% 7%		

SHADOW LEAF SPECIALS  
3-PIECE CONC. DEC. LESS 14%  
Tampa, Overwhite, etc.  
Green & White Brown & White List Less  
White 26%  
Dec 16%





PYRAMID ALLOY MANUFACTURING CO.

El Cerrito, California

BRANCH OFFICE AND WAREHOUSE  
223 South Los Angeles Street  
LOS ANGELES, CALIFORNIA  
Tucker 2784

DISCOUNT SHEET

Effective December 1, 1947

SUBJECT TO CHANGE WITHOUT NOTICE

All purchases from El Cerrito Plant and Main Office, 6416 Manila Street, El Cerrito, Calif., will bear the following discount rates on Dec. 1, 1947, List Prices, F.O.B. Plant.

Terms: 1% 10 Days; 30 Days Net; Interest 8% on Overdue Bal.

*Red head Dec List Plus 14%*

TAN BODY

Plain Sunflow	White List Plus	16%
Sunglow 61	Dec. List Less	24%
Sunglow 62	Dec. List Less	24%
Sunglow 63	Dec. List Less	24%
Sunglow 64	Dec. List Less	24%
Sunglow 65	Dec. List Less	24%
Sunglow 67	Dec. List Less	24%
Sunglow 68	Dec. List Less	24%
Sunglow 69	Dec. List Less	24%

*1st Rm Green (on) Mashed " - Plus 16%*

TAN BODY

Mohawk	Dec. List Less	9%
Tweed	Dec. List Less	24%
Monarch	Dec. List Less	9%
Dew Drop	Dec. List Less	24%
Alpine	Dec. List Less	9%
Madoc	Dec. List Less	46%
Western Tanover	Dec. List Plus	19%
Emerald Pattern	" " Less	19%
Amethyst	" " "	19%



PYRAMID ALLOY MANUFACTURING CO.

El Cerrito, California

BRANCH OFFICE AND WAREHOUSE  
223 South Los Angeles Street  
LOS ANGELES, CALIFORNIA  
Tucker 2784

DISCOUNT SHEET

Effective December 1, 1947

SUBJECT TO CHANGE WITHOUT NOTICE

All purchases from El Cerrito Plant and Main Office, 6416 Manila Street, El Cerrito, Calif., will bear the following discount rates on Dec. 1, 1947, List Prices, F.O.B. Plant.

Terms: 1% 10 Days; 30 Days Net; Interest 8% on Overdue Bal.

*Red head Dec List Plus 14%*

WHITE BODY

Plain White	White List	Plus 6%
L100 Palline	Dec. List Less	24%
L101 Marigold	Dec. List Less	24%
L104 Green Band & Line	Dec. List Less	24%
L105 Green Band & 2 Lines	Dec. List Less	24%
L106 Blue Band & Line	Dec. List Less	24%
L107 Blue Band	Dec. List Less	24%
L108 Red Band	Dec. List Less	24%
L50	Dec. List Less	24%
L51	Dec. List Less	24%
L52	Dec. List Less	24%
L60	Dec. List Less	24%
L66	Dec. List Less	24%
L53	Dec. List Less	24%

*1st Rm Green (on) Mashed " - Plus 16%*

WHITE BODY

Mohawk	Dec. List Less	19%
Tweed	Dec. List Less	19%
BALBO-8 Assorted Colors	Dec. List Less	19%
Monarch	Dec. List Less	19%
Dew Drop	Dec. List Less	19%
Alpine	Dec. List Less	19%
Madoc	Dec. List Less	19%
Shadow Leaf (on) Mashed " - Plus 16%		
3 Fine Coral SPECIALTIES - Plus 16%		
Teapots, Ovenware, etc.		
Green & White, Brown & White	Dec. List Less	24%
Emerald Blue White	Dec. List Plus	26%
Western Tanover	Dec. " "	6%



[Title of District Court and Cause.]

## MOTION FOR PRELIMINARY INJUNCTION

Plaintiff petitions this Court to issue a preliminary injunction restraining defendants from acts of unfair competition and in support of this petition submits the appended affidavits and exhibits and the accompanying points and authorities.

The grounds upon which plaintiff is entitled to a preliminary injunction are:

1. Plaintiff is engaged in the manufacture and sale of hotel china bearing original patterns, such china being identified by plaintiff's trade names "Shadowleaf," "Tweed," "Magnolia," "Hibiscus," etc. (Verified Complaint, paragraphs 4 and 6, affidavits of Elster, page A-2; Stein, page B-2; Wood, page D-3; Delany, page E-2 and 3; Clifford, page F-1 and 2).

2. Salability of china is dependent upon attractive appearance. Distinctive and original patterns have been originated by plaintiff for its hotel china, such patterns being identified by plaintiff's original trade names. (Complaint, paragraph 6; affidavits of Elster, page A-3 and 4; Wood, page D-2; Delany, page E-2 and 3; Stein, page B-2).

3. Plaintiff has extensively sold hotel china bearing its original patterns, under its trade names, throughout California and in many other states. Over fifty dealers are engaged in selling this hotel china. Plaintiff and its dealers have extensively

advertised the china. (Complaint, paragraphs 4, 5 and 6; affidavits of Wood, page D-2 and 4; Delany, page E-2 and 5; Elster, pages A-2 and 3; see Exhibit 8 illustrative of advertisement).

4. Purchasers buy hotel china by appearance and trade name. Purchasers recognize and associate the patterns and trade names as indicating china originating with plaintiff. (Complaint, paragraphs 7, 8; affidavits of Elster, page A-2 and 3; Stein, page B-2; Wood, page D-4; Delany, page E-3 and 5; Clifford, page E-2; Robertson, page C-2).

5. The original patterns and trade names owned by plaintiff, developed by plaintiff's efforts and expenditure of time, money and skill, have developed and represent good will and reputation which is recognized by the trade and purchasing public. (Complaint, paragraphs 7 and 8; Affidavits of Elster, page A-2; Stein, page B-1 and 2; Wood, page D-3 and 4; Delany, page E-3 and 4; Clifford, page F-2 and 3).

6. Defendants have copied plaintiff's distinctive patterns and are selling hotel china bearing such patterns, (Verified Complaint, paragraphs 9 and 10; compare Exhibits 1 and 2, Exhibits 3 and 4, Exhibits 9 and 10, Exhibits 11 and 12, Exhibits 13 and 14; affidavits of Elster, page A-3 and 4; Robertson, page C-2; Wood, page D-4 and 5; Delany, page E-4; Clifford, page F-3).

7. Defendants are selling and offering for sale



hotel china under the trade names owned by plaintiff. (Verified complaint, paragraphs 10 and 11; affidavits of Elster, page A-3 and 4 and Exhibit 7; affidavits of Wood, page D-5; Delany, page E-4; Clifford, page F-3; see Exhibit 6; affidavit of Robertson, page C-2).

8. The authorities cited in the appended memorandum incontrovertibly hold that the distinctive appearance of plaintiff's goods and plaintiff's trade-marks are property rights which must be protected against piracy. Defendants' acts come squarely within the acts prohibited by the Federal Code (see item I of appended memorandum). Unfair competition is established by the effect of defendants' acts upon the average person.

9. Defendants are in direct competition with plaintiff and its dealers. Plaintiff's business is being greatly damaged (Complaint, paragraph 12; affidavits of Wood, page D-4 and 5; Delany, page E-5 and 6). Plaintiff's good will and reputation are being destroyed by the flood of copies and may be irreparably and irretrievably lost unless immediately restrained. The public confidence in plaintiff's goods may be irreparably destroyed unless defendants are enjoined promptly (Affidavits of Elster, page A-5; Wood, page D-6; Clifford, page F-4).

10. Time is of the essence because several important exhibitions and shows are to be held in the near future at which plaintiff and defendants intend to exhibit their wares. Numerous buyers attend these shows. Defendants should be restrained

from unfairly diverting the fruit of plaintiff's good will at these shows and thereby appropriating business which belongs to plaintiff (Affidavits of Wood, page D-6; Delany, page E-6; Clifford, page F-3 and 4).

11. It is therefore respectfully urged that the Court issue a preliminary injunction restraining the defendants and each of them, their agents, employees, dealers and representatives, and each of them, from making or causing to be made, selling, offering for sale, advertising, exhibiting, marketing, or otherwise disposing of china bearing patterns deceptively similar to those originated by plaintiff or referred to or identified by plaintiff's trade names.

Dated this 31st day of May, 1951.

WALLACE CHINA CO., LTD.

By /s/ C. A. MIKETTA,

NAYLOR & LASSAGNE,

By /s/ JAS. M. NAYLOR,

Attorneys for Plaintiff.

### AFFIDAVIT OF SIDNEY ELSTER

State of California,

County of Los Angeles—ss.

Sidney Elster, being duly sworn, deposes and states that he is a resident of Los Angeles, California, and that he is part owner of a business



which has been operating under the name of Elster's at Los Angeles, California, for the past twenty years; that Elster's is engaged in the sale of vitrified hotel china, restaurant supplies and restaurant and hotel equipment. Deponent states that he has been actively engaged in the said business for the past seventeen years and is familiar with china and particularly vitrified hotel china as made and sold by various manufacturers for use by hotels, restaurants, etc.; that, based upon his seventeen years of experience with purchasers of vitrified hotel china and china from various manufacturers, as well as statements made to deponent by representatives of various manufacturers of china, deponent knows that Wallace China Co., Ltd., of Los Angeles, California, and china manufactured thereby are held in high esteem and have a high and valuable reputation and good will.

Deponent states that on about May, 1949, James R. Delany, Sales Manager of Wallace China Co., Ltd., first showed to deponent certain pieces of china bearing an overall pattern known as "Shadowleaf"; that to the best of deponent's knowledge this was the first time that deponent had seen a piece of vitrified hotel china provided with an overall pattern and to the best of deponent's knowledge said pattern was new and original; that he does not know and does not believe that a pattern similar thereto was on the market prior to the creation, production and introduction to the trade by Wallace China Co., Ltd.; that Exhibit 3, attached hereto, is a plate bearing said "Shadowleaf" pat-

tern as manufactured by Wallace China Co., Ltd.; that deponent does not know and does not believe that any other manufacturer identified a china pattern by the trade name "Shadowleaf" prior to deponent's knowledge as to the use of such trade name by Wallace China Co., Ltd., in May, 1949.

That deponent first purchased china bearing said "Shadowleaf" pattern and exemplified by Exhibit 3 attached hereto from Wallace China Co., Ltd., in May, 1949; that deponent advertised said pattern using photographs supplied by Wallace China Co., Ltd., in circulars, trade magazines, such as Pacific Coast Record, in daily newspapers and by direct mail; that Exhibit 8, attached hereto, is the front page of one direct mail circular extensively distributed by deponent in California and in other states. Deponent states that said "Shadowleaf" pattern was well received by the trade and became characteristic of and associated with Wallace China Co., Ltd., as the source; that during the years 1949 and 1950 deponent sold about 47,000 pieces of china made by Wallace China Co., Ltd., in said "Shadowleaf" pattern in the states of California, Nevada and New Mexico; that the 1949 sales were about 34,000 pieces and the 1950 sales were about 13,000 pieces.

Deponent states that on or about the first part of October, 1949, he was shown and offered china, bearing a pattern substantially identical to that appearing on china purchased under the trade name "Shadowleaf" from Wallace China Co., Ltd., by one Antone Pagliero, representing Technical Por-

celain & Chinaware Co. of El Cerrito, California, said company being also known as Tepco; that deponent immediately recognized the pattern as a Wallace China Co., Ltd., pattern; that said Antone Pagliero referred to the china being offered for sale by him to deponent as the "Shadowleaf" pattern or a copy of the "Shadowleaf" pattern; that a price list supplied to deponent by Technical Porcelain & Chinaware Co. made reference on its face to china manufactured and sold by Technical Porcelain & Chinaware Co. and bearing the copied pattern as the "Shadowleaf" pattern; that Exhibit 7, attached hereto, is photostatic copy of a price list supplied to deponent by Technical Porcelain & Chinaware Co. Deponent calls attention to the fact that said price list also offers for sale patterns under the trade names "Tweed" and "Hibiscus," both being trade names well known to represent China patterns made and sold by Wallace China Co., Ltd.

Deponent states that purchasers order china by trade name; for example, they ask for "Shadowleaf" and expect to get china manufactured by Wallace China Co., Ltd., and carrying the pattern associated therewith and popularized by Wallace China Co., Ltd.; that by the manufacture, distribution and sale of the copies under the same name, Tepco is making it possible for its dealers to commit a fraud upon the public.

Deponent states that during 1950 deponent purchased some of said "Shadowleaf" pattern from Technical Porcelain & Chinaware Co. (said china

being exemplified by Exhibit 4) and supplied the pieces so purchased to a prior customer of "Shadowleaf" pattern china manufactured by Wallace China Co., Ltd., in order to replace pieces broken in use by said customer; that the said customer did not know and did not recognize that the replacements so supplied him were not from the same source or origin as the originals, but instead was under the belief that they were from the same source, namely, Wallace China Co., Ltd. Deponent states that he purchased said "Shadowleaf" pattern from Technical Porcelain & Chinaware Co. because it had the same appearance and was cheaper in price. Deponent states that the copies of "Shadowleaf" pattern were shipped to Elster's by Technical Porcelain & Chinaware Co. in cartons which closely resembled those used by Wallace China Co., Ltd., which were printed in the same color, namely, blue; that the arrangement of the words and lettering was very similar to that used by Wallace China Co., Ltd., on its cartons and the cartons received from Technical Porcelain & Chinaware Co. bore the trade name "Shadowleaf"; that Exhibit 6, attached hereto, is a photostatic copy of one face of the cartons used by Tepco in the shipment of copies of china under the trade name "Shadowleaf" owned by Wallace China Co., Ltd., that said Exhibit 6 can be compared to Exhibit 5 which shows one face of a carton used by Wallace China Co., Ltd.

Deponent states that in order to maintain the good will, value and popularity of the "Shadowleaf" pattern originated by Wallace China Co.,



Ltd., deponent has refrained from selling the pattern to restaurants or hotels in proximity to each other; that Technical Porcelain & Chinaware Co. has sold the imitation or copy under the name "Shadowleaf" indiscriminately to large restaurants and to small inexpensive lunch rooms and to purchasers having eating places in proximity to each other, whereby the pattern has lost its desirability; deponent states that since Tepco has engaged in the sale of copies, numerous prospective customers have refused to purchase the "Shadowleaf" pattern from deponent by reason of the indiscriminate sale of the copies by Tepco; that deponent's business in china manufactured by Wallace China Co., Ltd., has dropped and decreased by reason of the competition and the disrepute occasioned by acts of Technical Porcelain & Chinaware Co. Deponent is informed and believes and therefore states that the china manufactured and sold by Tepco is inferior in quality, durability and finish to that manufactured by Wallace China Co., Ltd., and that Governmental bureaus of the County of Los Angeles will not purchase Tepco china for use in County institutions for this reason, whereas china manufactured by Wallace China Co., Ltd., is so purchased and used by said County organizations.

That deponent believes and alleges that the acts of Tepco cause deception and confusion of purchasers as to the nature, quality and source of the china sold by Technical Porcelain & Chinaware Co. and constitute unfair trade practices and unfair



competition and are causing irreparable damage and injury to deponent, to Wallace China Co., Ltd., and to other dealers supplied by Wallace China Co., Ltd.

Dated this 27th day of April, 1951.

/s/ SIDNEY ELSTER.

Subscribed and sworn to before me this 27th day of April, 1951.

[Seal]     /s/ FAYE POLIN,  
Notary Public in and for the County and State  
above named.

My Commission Expires Feb. 19, 1952.

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**DISH CARRIERS** — All metal construction. Reinforced wire top edge.  
\$3.19 ea.

**USED PLATES**  
50c DOZEN  
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See our Complete Selection of Stainless Steel ladles and spoons 59c each and up.



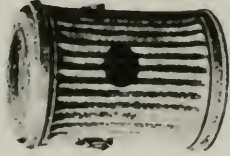
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Designed and made exclusively for Elster's in Los Angeles

**HEAVY CAKE COVERS**  
10" Platters  
Each \$1.50

**PLATTERS** — 10", hotel weight. Vitrified china, white body with red line. Per doz. \$3.95



**GARBAGE CANS**  
Heavy Duty  
Drop Handle  
Immediate Delivery

**COFFEE CREAM**  
1/2 qt. 1c  
1 qt. 1c

**ROAST PAN** — 22 gauge black iron, folded corners. Wire reinforced rim, stripped. Drop handles.  
Each ..... 95c



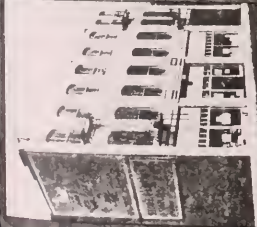
mm, tapered finish hardwood block, tapered. Brush 16", complete with 48" screw-in stick. Each \$1.95

**ASK ABOUT THE D. T. PLAN — TRADE YOUR OLD DISHES FOR NEW**

**Shop cash & carry at Elster's new self-service Basement Store**

All merchandise subject to stock on hand





*Home of the  
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Michigan 6551 ZEnith 6551 115 So. Los Angeles St.  
55000 square feet of values  
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**IN THE WHOLESALE DISTRICT**

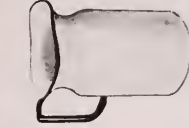
OPEN 8:30 A.M. to 5:30 P.M. INCLUDING SATURDAYS. MONDAYS TILL 9:00 P.M.

**These Sensational Buys Only at ELSTER'S**

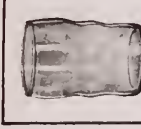


**SALT or PEPPER SHAKERS.**—Resists stains, scratches, rust and corrosion. Clear glass body with heavy duty top. Per doz. 29¢

**TEASPOON-STAINLESS STEEL.**—Resists stains, scratches, rust and corrosion. Heavy duty. Per doz. 39¢



**WHITE ENAMEL PITCHER.**—4 quart capacity. Heavy duty with handles. Each 99¢



**WATER TUMBLERS.**—8 1/2 oz. capacity. Resists stains, scratches, rust and corrosion. Heavy duty. Per doz. 94¢



**KNIVES.**—Stainless Steel Blade. Each \$1.95



**WEAR-EVERY POT with COVER.**—Aluminum. 10 qt. capacity, dome top. Resists stains, scratches, rust and corrosion. Heavy duty. Per doz. 3.95

**METAL ASH TRAYS.**—Aluminum. 8 1/2" x 11 1/2". Each 97¢

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**GLASS ASH TRAYS.**—Glass. 8 1/2" x 11 1/2". Each 45¢

**DISH CARRIERS.**—All metal construction. Stained wire top. 59¢ each and up.



**USED PLATES.**  
50¢ DOZEN  
AND UP

See our  
Complete  
Selection of  
Stainless  
Steel  
ladles and  
spoons  
59¢ each  
and up.



**HEAVY  
CAKE COVERS.**—Stainless Steel. 12" x 12". Each \$1.50

**PLATES.**—10" - heavy weight. Stained wire top. 59¢ each and up.

SEE THE FABULOUS "SHADOW LEAF" PATTERN



**FLOOR BRUSH.**—Black. 18" x 18". 7 1/2" square. Brush 18" x 18". complete with 48" screw in stick. Each \$1.95



**POST PAN.**—7 1/2" square. black iron. folded corners. Wire reinforced rim. stamped. Drop handles. Each 95¢



**COFFEE CREAMER.**—Glass. 1 1/2" x 1 1/2". Each 1¢

**GARBAGE CANS.**—Heavy Duty. Deep Handle. 18" x 18". 18" x 18". Delivery

ASK ABOUT THE D. T. PLAN—TRADE YOUR OLD DISHES FOR NEW

All merchandise subject to stock on hand

Shop cash & carry at Elster's new self-service Basement Store





AFFIDAVIT OF OSCAR STEIN

State of California,

County of Los Angeles—ss.

Oscar Stein, being duly sworn, deposes and states that he is a resident of Long Beach, California, and that he is the sole owner and operator of a business known as Long Beach Store Fixture Co. located at 330 Locust, Long Beach, California; that deponent has been in said business of distributing restaurant and hotel supplies since 1927; that deponent sells and acts as dealer for vitrified hotel china manufactured by Wallace China Co., Ltd., and by others; that by reason of his twenty-three years' experience with purchasers of vitrified hotel china deponent knows that Wallace China Co., Ltd., of Los Angeles, California, and china manufactured thereby are held in high esteem and have a good reputation and valuable good will.

Deponent states that he does not remember seeing any overall pattern on hotel china manufactured by anyone other than Wallace China Co., Ltd., and that the overall patterns of hotel china manufactured and sold by Wallace China Co., Ltd., are different, distinctive and materially add to the appearance of the china. Deponent states that by the term "overall pattern" reference is made to a pattern which is not composed of a separate and distinct border ornamentation nor to china which carries a border and a separated, centrally disposed decoration, but instead refers to china wherein the entire upper surface of a plate or the entire outer surface of a cup is covered with a pattern.

Deponent states that the appearance of vitrified hotel china is very important, since customers buy china by reason of its appearance and such appearance must be attractive and distinctly different from other china. Deponent further states that customers refer to and purchase china by trade names, such as the trade name "Shadowleaf" applied to a distinctive overall pattern manufactured by Wallace China Co., Ltd., and first shown to deponent by James R. Delany, sales manager of Wallace China Co., Ltd., in 1948; that the trade name "Shadowleaf" is, to the best of affiant's knowledge, original with Wallace China Co., Ltd., and associated with a distinctive pattern of china manufactured and sold by Wallace China Co., Ltd.

Deponent states that he has purchased from Wallace China Co., Ltd., large quantities of china bearing the distinctive overall pattern identified by the trade name "Shadowleaf" and exemplified by Exhibit 3. That in 1948 deponent purchased approximately 27,600 pieces of such "Shadowleaf" china for resale to various restaurants; that in 1949 deponent purchased approximately 13,600 pieces of such china and in 1950 purchased approximately 15,200 pieces of such china from Wallace China Co., Ltd., for resale.

Deponent states that Harold K. Robertson has been employed by deponent for over ten years as salesman and is now manager.

Dated this 18th day of May, 1951.

/s/ OSCAR STEIN.

Subscribed and Sworn to before me this 18th day of May, 1951.

[Seal]      /s/ MORRIS S. BROWER,  
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires March 16, 1955.

AFFIDAVIT OF HAROLD K. ROBERTSON  
State of California,  
County of Los Angeles—ss.

Harold K. Robertson, being duly sworn, deposes and states that he is a resident of Long Beach, California; that for ten years last past he has been employed as manager for Long Beach Store Fixture Co., located at Long Beach, California, said business relating to the sale of cafe, restaurant and kitchen equipment such as china, glassware, silverware, ranges, etc., said business being owned by Oscar Stein.

Deponent states that in the course of his duties he has sold vitrified china manufactured by Wallace China Co., Ltd., of Vernon, California, and by other manufacturers; that the china manufactured by Wallace China Co., Ltd., has a good reputation and is characterized by distinctive, overall, shaded patterns such as the one known under the trade name "Shadowleaf"; that purchasers buy china by reason of its distinctive pattern or appearance and by trade name, and the "Shadowleaf" pattern and

trade name is associated with and recognized as a Wallace China Co., Ltd., pattern.

Deponent states that about the middle of November, 1950, one Antone Pagliero, representing himself to be acting for Technical Porcelain & China-ware Co., appeared at the Long Beach Store Fixture Co. store and showed to deponent a piece of hotel china which deponent immediately recognized as the Wallace "Shadowleaf" pattern; that said Pagliero offered to sell china bearing such pattern to deponent, for resale; that said Pagliero stated to deponent that the china being offered for sale was a copy of a Wallace China Co., Ltd., pattern.

Deponent further states that deponent received a telephone call from an old customer operating a restaurant in Long Beach, to whom deponent had sold "Shadowleaf" china made by Wallace China Co., Ltd., some months before; that said customer complained that the "last shipment" of "Shadowleaf" china was off-color and that the pattern was smeary; that deponent personally went to the customer's restaurant and discovered that said customer had purchased the imitation of the "Shadowleaf" pattern from Technical Porcelain & China-ware Co. to replace some of the original Wallace china and that the imitation appeared the same to the general observer, but upon close comparison had a slightly different color and the pattern was somewhat smeary.

Dated this 18th day of May, 1951.

/s/ HAROLD K. ROBERTSON.



Subscribed and sworn to before me this 18th day of May, 1951.

[Seal]:     /s/ MORRIS S. BROWER,  
Notary Public in and for the County of Los Angeles,  
State of California.

My Commission Expires March 16, 1955.

### AFFIDAVIT OF KENNETH O. WOOD

State of California,  
County of Los Angeles—ss.

Kenneth O. Wood, being duly sworn, deposes and states that he is the president of Wallace China Co., Ltd., a California corporation, engaged in the manufacture and sale of vitrified hotel china for over twenty years last past, with a plant at Los Angeles, California. Deponent states that he has been president of the said corporation since about August, 1943, and is familiar with all of the operations of the said company, its products, trade names and activities; that sales of the products of the said corporation are under the supervision of James R. Delany, sales manager and that said Delany has been in the employ of deponent and actively engaged in the sale of vitrified hotel china as manufactured and sold by deponent's corporation since about February, 1948.

Deponent states that the principal product manufactured and sold by the said corporation is vitrified hotel china and that said china is highly regarded in the trade for its durability, the imper-



vious, non-porous glaze carried by such china, such glaze being hard, resistant to scratches and capable of standing up under the rapid temperature changes and knocking about to which it is subjected in use without chipping or crazing; that the vitrified hotel china manufactured and sold by deponent's corporation includes a series of attractive, original and distinctive patterns which impart highly desirable and necessary eye appeal and esthetic sense to the said china; that said distinctive patterns originated by deponent's corporation, Wallace China Co., Ltd., are recognized by the trade as indicating origin in deponent's corporation.

Deponent states that although the plant of the corporation is located in Los Angeles, California, approximately 40% of the vitrified hotel china manufactured and sold by the corporation is shipped to dealers outside the State of California and is therefore in interstate commerce; that the sales activities of deponent's corporation cover the entire western half of the United States; and that deponent's corporation has over 50 established dealers in California, Washington, Oregon, Utah, Arizona, Oklahoma, Texas, Kansas, Georgia and elsewhere.

Deponent states that during the past twenty years, by the exercise of judgment and effort and the expenditure of large sums of money for technical assistance, supervision, equipment and materials, the corporation had engendered and built up a large and valuable good will in the high quality and attractiveness of its products; that great care and

much effort is exercised by deponent and the employees of the said corporation in the selection and preparation of clays and ingredients entering into the manufacture of vitrified hotel china, the formation of the ware, in burning the ware, and in the construction and control of the equipment used, in compounding and maturing the glazes, the preparation of the patterns, the inspection of the ware and the packaging of the ware and other operations directed to the manufacture of vitrified hotel china of the highest possible quality and the maintenance of such quality.

Deponent states that in addition to its high durability and excellent physical characteristics, the vitrified hotel china manufactured and sold by deponent's corporation is known for its eye appeal or beauty resulting from the colors and patterns carried thereby; that the corporation has spent time, effort and money in popularizing said distinctive patterns under the trade names "Shadowleaf," "Tweed," "Hibiscus," "Magnolia," etc; that said trade names are used in identifying specific and distinctive patterns originated by deponent's corporation; that said trade names are used in catalogs published by deponent's corporation and in advertising cuts and literature supplied to dealers in products made and sold by deponent's corporation, which cuts and literature are used by the dealers in advertising in daily newspapers and otherwise in the cities in which the dealers are located.

Deponent states that the corporation employs artists to design distinctive patterns and inasmuch

as public tastes change it is necessary and desirable to periodically initiate the manufacture and sale of a new and distinctive pattern; that the corporation employs artists to design such patterns and said artists, in conjunction with other employees, have developed methods of producing highly desirable shading effects on the ware without the necessity of hand painting the ware; that in such process, as developed by deponent's corporation, the artist's drawing of the pattern is etched upon a printing cylinder or roller which is then chromium plated and used in printing the pattern upon a special thin paper stock with specially prepared transfer inks; that suitably cut portions of such transfer are then applied to the chinaware and burned, causing the pattern to be made an integral and inseparable part of the ware in the desired colors; that in this manner distinctive, shaded, overall patterns have been developed, such patterns being distinctive and characteristic of china sold by deponent's corporation.

Deponent states that on or about May, 1948, an artist employed by Wallace China Co., Ltd., produced a distinctive and novel design which was reproduced on a printing cylinder and said design used in the production of vitrified hotel china by the corporation since about July, 1948; that the corporation appropriated, adopted and used the distinctive trade name "Shadowleaf" in identifying its vitrified hotel china bearing said ornamental and distinctive design since about July, 1948; that

the chinaware bearing the said "Shadowleaf" design or pattern was publicized, exhibited, advertised and sold by deponent's corporation and its dealers continuously in interstate and intrastate commerce since about July, 1948, and sales thereof increased rapidly until recent months; that over 112,000 pieces of said "Shadowleaf" china were sold by Wallace China Co., Ltd., during 1949; that in 1950 total sales of "Shadowleaf" china dropped to about 107,000 pieces.

Deponent states that during the summer of 1949 Technical Porcelain & Chinaware Co., a partnership having a plant at El Cerrito, California (said partnership also being known as Tepco) copied the said "Shadowleaf" pattern and began to indiscriminately sell such copies under the trade name "Shadowleaf." Deponent states that Tepco willfully, maliciously and consciously made a copy of the pattern and in support of this statement deponent states that Exhibit 1 attached to the complaint herein is a print of the pattern from the printing rollers used by Wallace China Co., Ltd., since about July, 1948; that Exhibit 2 attached to the complaint is a print of the pattern from a roller used by Tepco, said roller being made for and on behalf of Tepco by the same engraver used by deponent's corporation but without consent or knowledge of Wallace China Co., Ltd. Deponent calls attention to the fact that these two prints, Exhibits 1 and 2, are identical as far a pattern is concerned and have the same arrangement of foreground leaves, middle ground leaves and background; that depo-



ment has examined china manufactured and sold by Tepco and bearing said pattern and deponent states that the Tepco ware is deceptively similar to the ware manufactured and sold by Wallace China Co., Ltd., and deceives the public into the belief that the copies are products made by deponent's corporation. That Exhibits 3 and 4 are exemplars of china made by Wallace China Co., Ltd., and by Tepco, respectively and it is evident that the imitation creates the same effect and deceives the purchaser as to source and identity of the china. Deponent states that such willful, unfair copying of the distinctive pattern, as well as the unlawful use of the trade name "Shadowleaf," has damaged deponent's corporation and its good will and has caused and is causing great damage and injury to the business of Wallace China Co., Ltd., as evidenced by the drop in sales of the said pattern and the reluctance of many dealers and customers to purchase the said pattern because of the indiscriminate, widespread sale of the copies by Technical Porcelain & Chinaware Co.

Deponent states that to the best of his knowledge and belief Technical Poreclain & Chinaware Co. has embarked upon a course of conduct and piracy of the distinctive designs and trade names originated by and first appropriated by Wallace China Co., Ltd., and in support of this statement deponent states that said Technical Porcelain & Chinaware Co. has initiated the manufacture and sale of other distinctive designs first conceived, manufactured and sold by deponent's corporation and



has unlawfully used trade names first appropriated and used by deponent's corporation in identifying such patterns, namely, "Tweed," "Hibiscus" and "Magnolia." That Technical Porcelain & Chinaware Co. is appropriating the results of the efforts of deponent's corporation and is trading on the good will and reputation of Wallace China Co., Ltd., to the great damage and irreparable injury of deponent's corporation by diverting sales from Wallace China Co., Ltd., to Technical Porcelain & Chinaware Co. and its dealers.

Deponent further states that Wallace China Co., Ltd., has gone to great trouble and expense in planning an advertising campaign directed to the presentation and sale of the aforementioned distinctive patterns to the hotel and restaurant trade, including in such promotional efforts attendance and exhibits at various shows and exhibitions; that during June, 1951, a show shall be held at the Shamrock Hotel at Houston, Texas, known as the Texas and Southwestern Regional Restaurant Show sponsored by the Texas Restaurant Association; that thereafter a Pacific Coast Regional Convention and Exhibition sponsored by the Golden Gate Restaurant Association will be held in San Francisco; that deponent's corporation plans to attend and have exhibits at the said shows; that deponent has been informed and therefore believes that Technical Porcelain & Chinaware Co. intends to have its representatives exhibit copies of the various patterns originated by deponent's corporation at the said shows; that irreparable harm would result

from such exhibition of infringing copies and that deponent therefore believes that it is essential that Technical Poreclain & Chinaware Co. be restrained and enjoined from manufacturing, selling, offering for sale, exhibiting, advertising or promoting the sale or publicizing its said copies of the distinctive designs originated by deponent's corporation and from the use of the trade names first appropriated and used by deponent's corporation, prior to trial of this action and permanently thereafter.

Deponent states that Antone Pagliero, general partner of Tepco has been notified of his said unlawful copying of Wallace China Co., Ltd., patterns and trade names, but refused to cease said acts of infringement and unfair competition and, instead has personally told deponent that in the event Wallace China Co., Ltd., were to bring this suit against Tepco, Tepco would drastically reduce prices on the copied patterns of china with the purpose and intent to thereby prevent Wallace China Co., Ltd., from being able to sell its china at a reasonable profit.

Dated this 25th day of May, 1951.

/s/ KENNETH O. WOOD.

Subscribed and sworn to before me this 25th day of May, 1951.

[Seal] /s/ MILDRED K. BADGER,  
Notary Public in and for the County and States  
above named.

My Commission Expires March 2, 1952.

AFFIDAVIT OF JAMES R. DELANY

State of California,  
County of Los Angeles—ss.

James R. Delany, being duly sworn, deposes and states that he is a resident of Los Angeles, California, and since November, 1948, has been and still is sales manager of Wallace China Co., Ltd., a California corporation, manufacturers of vitrified hotel china with a plant and offices at Vernon, California (a subdivision of Los Angeles). Deponent states that he is thoroughly familiar with all of the patterns and types of china manufactured and sold by Wallace China Co., Ltd., the manner in which said patterns are sold, the customers to whom said patterns are sold, etc., and states that approximately 40% of the vitrified china sold by Wallace China Co., Ltd., is sold to purchasers and dealers located outside the State of California.

Deponent states that during the period 1927-1948, he was engaged in sales work for the Dohrman Hotel Supply Company, a corporation having sales office at Los Angeles, San Diego, San Francisco, San Jose, Fresno, Phoenix, Portland and Seattle, as well as in certain other locations; that Dohrman Hotel Supply Company is engaged in the sale of chinaware, glassware and kitchen equipment for use by hotels and restaurants; that during said twenty-one year period with Dohrman Hotel Supply Company affiant became thoroughly familiar with china as manufactured and sold by numerous manufacturers, inasmuch as deponent concentrated his

sales efforts in the sale of chinaware and Dohrman represented six of the leading nationally-known chinaware manufacturers including Wallace China Co., Ltd.; that by reason of his experience with representatives from various chinaware manufacturers and experiences with purchasers of vitrified hotel china deponent knows that prior to 1948, and to this date Wallace China Co., Ltd., and china manufactured thereby are held in high esteem and have high and valuable reputation and good will.

Deponent states that to the best of his knowledge Wallace China Co., Ltd., originated overall patterns for vitrified hotel china, said overall patterns imparting a three-dimensional effect and having an exceptionally attractive appearance; that appearance is extremely important in the sale of china since purchasers buy the china because of its artistic or pleasing appearance and it is necessary that the china be pleasing to the ultimate consumer and user. Deponent states that to the best of his knowledge Wallace China Co., Ltd., were the first to produce china bearing overall patterns and the first to have used trade-names "Festival," "Shadowleaf," "Hibiscus" and "Magnolia" associated with such patterns; that to the best of his knowledge and belief Wallace China Co., Ltd., was the originator of a design sold by Wallace under the name "Tweed" and the originators and first users of such trade-name "Tweed" as applied to a line of china; that "Tweed" is a distinctive pattern in that the decoration leaves a square unadorned in the central area of a circular plate. Deponent states that the various



decorated patterns of china sold by him for and on behalf of Wallace China Co., Ltd., are always referred to by their trade-names; that Exhibits 3, 9, 11 and 13 are representations of china sold under the names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" by Wallace China Co., Ltd.; that it is the practice to ship said china in corrugated board containers printed in blue and to identify the decoration or pattern and the color thereof on the containers by stencilling or writing the name of the pattern packed within the container; that Exhibit 5 is a photostatic copy of a typical container as shipped by Wallace China Co., Ltd., indicating that its contents comprise the "Shadowleaf" pattern. Deponent states that the various patterns originated and sold by Wallace China Co., Ltd., have been well received by the trade and are characteristic of and associated with Wallace China Co., Ltd., as the source. That a piece of china bearing one of said patterns represents to the purchaser a piece of china of high quality originating with Wallace China Co., Ltd. That Dohrman Hotel Supply Company is an established dealer for china manufactured by Wallace China Co., Ltd., particularly for the pattern known under the trade-name "Tweed," and sells said pattern through its many branch offices in California, Washington, Oregon and Arizona.

Deponent states that he has personally seen price lists distributed by Technical Porcelain & China-ware Co. of El Cerrito, California, said price lists carrying thereon reference to patterns under the



names "Shadowleaf," "Tweed" and "Hibiscus"; that Exhibits 7a and 7b are photostatic copies of such price lists. Deponent states that he has personally seen china manufactured by Technical Porcelain & Chinaware Co., which is also known as Tepco, and sold under the names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia"; that Exhibits 4, 10, 12 and 14 are representations of patterns of china sold by Tepco under the names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia."

Deponent states that to the casual observer or purchaser the copies manufactured and sold by Tepco are deceptively similar to the original patterns manufactured and sold under the same trade-names by Wallace China Co., Ltd., and said copies tend to deceive the observer or purchaser as to the quality, nature and source of the china in that the purchaser believes that such china is manufactured by Wallace China Co., Ltd., and are of the high quality associated with such patterns. Deponent states that by the use of the trade-names "Tweed," "Shadowleaf," "Magnolia," etc., Technical Porcelain & Chinaware Co. is falsely representing to the trade that said china is of the same high quality as that manufactured by Wallace China Co., Ltd., and that in effect originates with Wallace China Co., Ltd.; that such acts are contrary to commercial good faith and to the normal and honorable development of business activities. Deponent states that the deception and copying is carried to the containers in which Tepco ships said china in that

the trade-names first appropriated and used by Wallace China Co., Ltd., and by usage and advertising grown to mean china originating with Wallace China Co., Ltd., are unfairly placed upon cartons of china by Tepco, as evidenced by Exhibit 6. Deponent states that the Tepco cartons are deceptively similar to Wallace cartons, as evidenced by a comparison of Exhibits 5 and 6.

Deponent states that he personally makes sales calls on many dealers in hotel and restaurant supplies and that over 50 dealers, in various states of the United States, carry china manufactured by Wallace China Co., Ltd.; that in order to maintain the distinctiveness and desirability of the original patterns of Wallace China Co., Ltd., some dealers carry certain of said patterns while others carry other patterns, and each dealer exercises discretion in the sale of a given pattern to avoid the possibility of having two closely adjacent restaurants use china of the same pattern; that by reason of such careful sales program the distinctiveness, desirability and value of the patterns has been enhanced and maintained.

Deponent states that he personally knows that Tepco has sold its copies to restaurants which originally bought Wallace china and that the said restaurants were deceived in believing that what they bought from Tepco was a product of Wallace China Co., Ltd.; that deponent and his dealers have had to spend much extra time and effort in explaining to dealers and their customers that the china being offered for sale and sold thereto is not the genuine

Wallace china but an imitation, that customers have complained to dealers in Wallace china that the china was inferior to that originally supplied and upon investigation it was found that the complaint was directed to imitations sold by Tepco.

Deponent states that the Tepco imitations are deceptively similar to the originals manufactured by Wallace China Co., Ltd., and have deceived not only the ultimate purchaser but also experienced dealers; that Tepco has sold the imitations and copies indiscriminately and to restaurants in the same vicinity, thereby causing deponent's customers and prospective customers to refuse to buy the Wallace patterns because they were imitated and made common by such indiscriminate selling by Tepco; that as a result of such copying by Tepco the business and sales of Wallace China Co., Ltd., in such copied patterns has decreased and deponent and Wallace China Co., Ltd., have been damaged.

Deponent states that during June, 1951, a show shall be held at the Shamrock Hotel at Houston, Texas, known as the Texas and Southwestern Regional Restaurant show and thereafter a Pacific Coast Regional Convention and Exhibition sponsored by the Golden Gate Restaurant Association will be held at San Francisco; that deponent intends to attend said shows and to exhibit the Wallace china, particularly the distinctive patterns hereinabove referred to and that Wallace China Co., Ltd., is planning to spend considerable sums of money in so advertising and sponsoring the said patterns. Deponent is informed and believes that

Tepco intends to exhibit its copies of the Wallace patterns at the above-described shows; deponent states that irreparable harm and damage and confusion would result from the exhibition and offer to sell such copies, and strongly urges that a preliminary injunction be issued restraining Tepco in order to prevent the good will and reputation of Wallace China Co., Ltd., its products and trade-names from being ruined and destroyed by the unfair acts of Tepco.

Dated this 24th day of May, 1951.

/s/ JAMES R. DELANY.

Subscribed and sworn to before me this 24th day of May, 1951.

[Seal]     /s/ MILDRED K. BADGER,  
Notary Public in and for the County and State  
above named.

My Commission Expires March 2, 1952.

## AFFIDAVIT OF STEPHEN J. CLIFFORD

State of California,  
County of Los Angeles—ss.

Stephen J. Clifford, being duly sworn, deposes and states that he is a resident of Los Angeles, California; that for three years last past he has been and still is employed by Wallace China Co., Ltd., of Huntington Park, Vernon, County of Los Angeles, as salesman; that said Wallace China Co., Ltd., is engaged in the manufacture and sale of



vitricified hotel china; that deponent is engaged in selling the said china throughout the State of California and in Washington, Oregon, Arizona and elsewhere. Deponent states that approximately fifty dealers located in California and in other states sell and distribute the Wallace china; that said dealers are supplied with photographs and advertising matter.

Deponent states that Wallace China Co., Ltd., originated distinctive overall patterns for its hotel china, said patterns imparting a three-dimensional effect and being characterized by a gradation of shading which imparts an exceptionally attractive appearance to the china; that said original designs are extensively sold by deponent for and on behalf of Wallace China Co., Ltd., under trade-names originated and appropriated by Wallace, said names including "Shadowleaf," "Tweed," Hibiscus" and "Magnolia."

Deponent states that purchasers buy china by appearance and trade-name and that the patterns and trade-names owned and appropriated by Wallace China Co., Ltd., have acquired good will and represent to the purchasers hotel china originating with Wallace China Co., Ltd., and characterized by the high quality and good business reputation of the said company. Deponent states that from his contact with various distributors and with representatives of other manufacturers of hotel china, deponent knows that the patterns and trade-names of Wallace China Co., Ltd., have acquired great good will and a reputation for quality and de-



pendability; that the original patterns and trade-names herein referred to, developed by Wallace China Co., Ltd., represent good will and reputation which is recognized by the trade and purchasing public.

Deponent states that he has personally ascertained that Technical Poreclain & Chinaware Co. of El Cerrito, California, said company being also known as "Tepco," has manufactured, sold and offered for sale imitations or copies of said distinctive and original patterns originated by Wallace China Co., Ltd.; that Exhibit 3 appended to the complaint herein is a representation of a plate bearing what is known as the "Shadowleaf" pattern, manufactured by Wallace China Co., Ltd.; that Exhibit 4 appended to the complaint is a representation of a plate manufactured and sold by Tepco under the name "Shadowleaf"; that the china manufactured and sold by Tepco under the name "Shadowleaf" is deceptively similar to the pattern sold by Wallace.

Deponent states that in the course of his travels out of the State of California deponent has personally seen hotel china being exhibited and offered for sale by dealers in states other than California, the china being an imitation or copy of the Wallace "Shadowleaf" pattern and exemplified by Exhibit 4, said imitation being manufactured and sold by Tepco.

Deponent states that the distribution of copies and imitations by Tepco has caused confusion among dealers and purchasers and has deceived them into

believing that the china is manufactured by Wallace China Co., Ltd.; that deponent has had to spend additional time and effort in calling upon dealers and customers to investigate complaints caused by the sale by Tepco of copies of the distinctive and unique designs originated by Wallace; that deponent has received numerous complaints from his dealers by reason of the widespread sale of the imitations manufactured by Tepco and that the business of Wallace China Co., Ltd., in the sale of china bearing the aforesaid distinctive patterns has been damaged by the acts of piracy by Tepco.

Deponent states that one of the best means of advertising and selling hotel china is by personal contact and exhibitions of china at shows and conventions and that in the past deponent and the Sales Manager, James R. Delany of Wallace China Co., Ltd., have attended and exhibited the patterns hereinabove referred to at numerous shows in the western part of the United States and intend to continue such practice. Deponent states that during June, 1951, a show shall be held at the Shamrock Hotel at Houston, Texas, known as the Texas and Southwestern Regional Restaurant Show and that thereafter a Pacific Coast Regional Convention and Exhibition, sponsored by the Golden Gate Restaurant Association will be held at San Francisco; deponent is informed and believes that an extensive exhibit of Wallace china, including the said distinctive patterns, has been planned for both of said shows, inasmuch as many buyers attend these shows; deponent is informed and believes that Tepco intends

to exhibit its imitations and copies of the Wallace patterns at the above-described shows; deponent states that steps must be taken promptly to stop the acts of copying and misrepresentation whereby the good will and reputation of the Wallace patterns and trade-names is being irreparably injured and to stop Tepco from exhibiting its said copies at the above-described shows in order to prevent confusion and deception of purchasers and the probable destruction of the good will and reputation which has been acquired in said patterns and trade-names by Wallace China Co., Ltd.

Dated this 24th day of May, 1951.

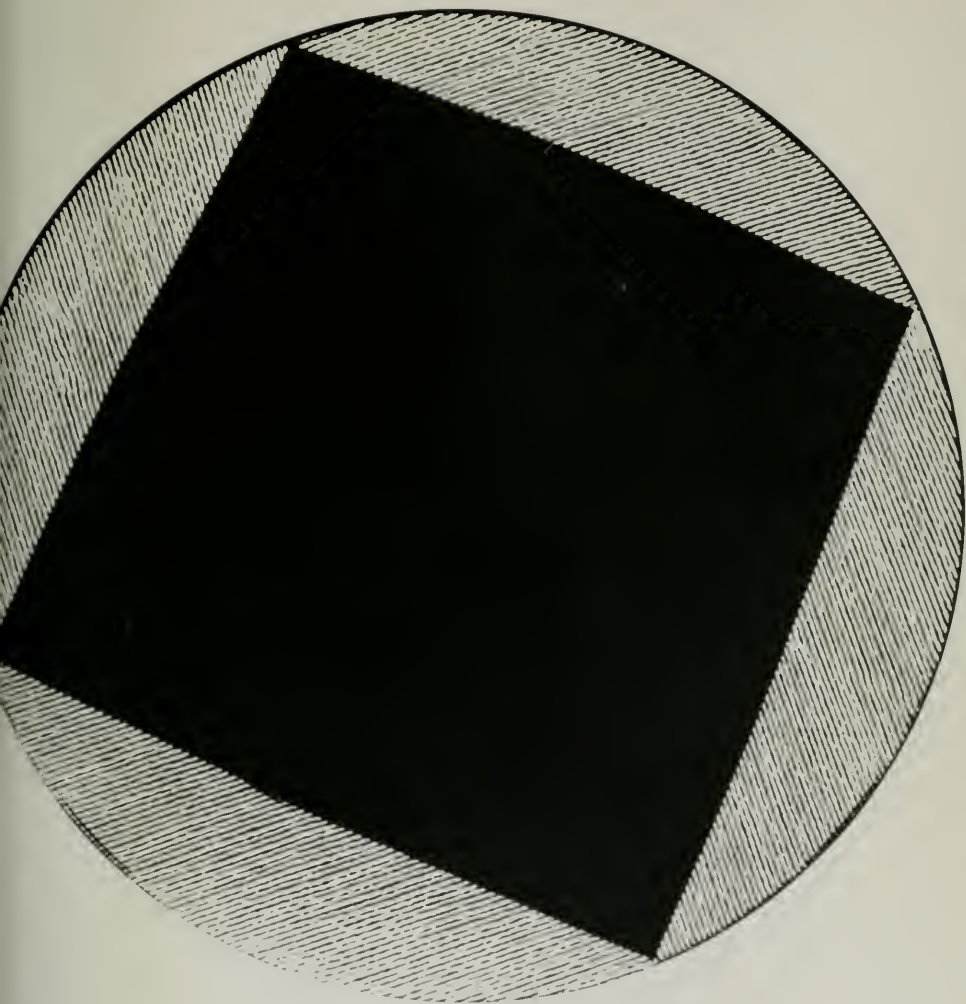
/s/ STEPHEN J. CLIFFORD.

Subscribed and sworn to before me this 24th day of May, 1951.

[Seal]     /s/ MILDRED K. BADGER,  
Notary Public in and for the County and State  
above named.

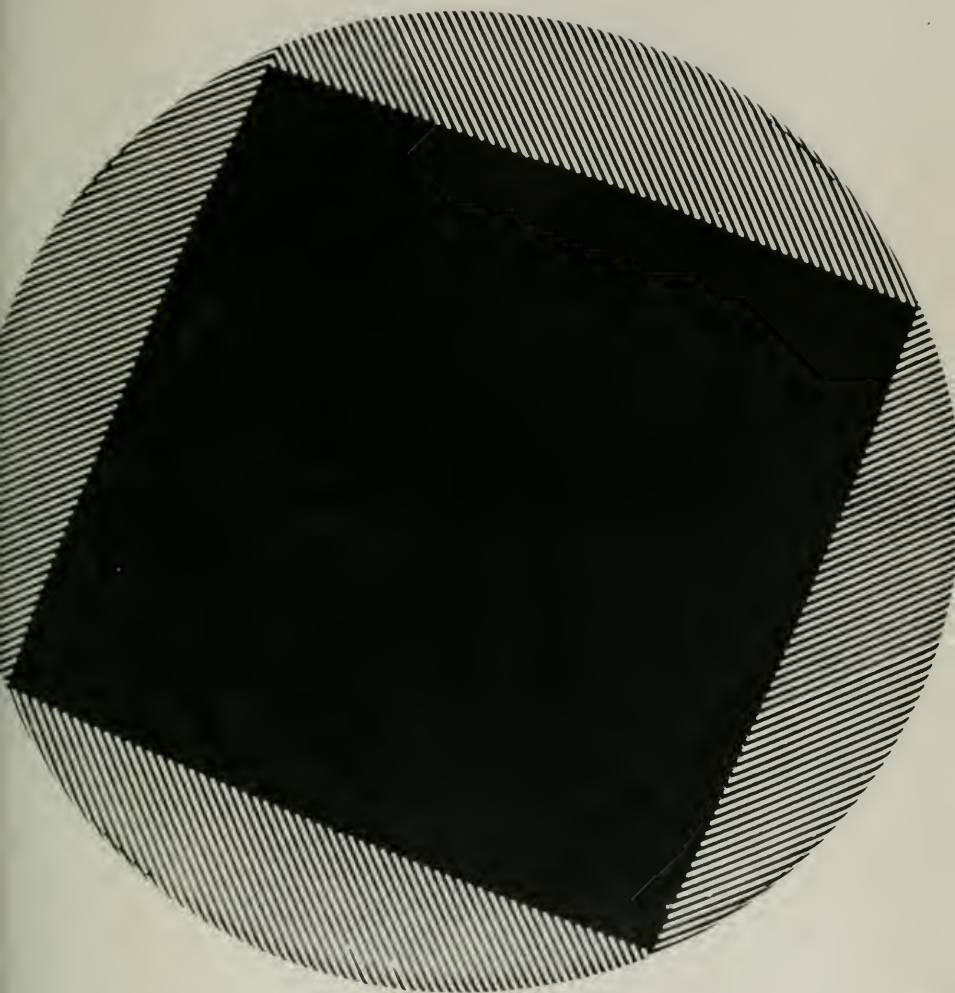
My Commission Expires March 2, 1952.





























Endorsed : Filed May 31, 1951.

Exhibit 14  
33A





[Title of District Court and Cause.]

## ORDER TO SHOW CAUSE

To Antone Pagliero, Arthur Pagliero and John Pagliero, doing business as Technical Porcelain & Chinaware Co. and Antone Pagliero, Mary Jean Pagliero and Delina Pagliero, doing business as Pyramid Alloy Manufacturing Co., and Henry G. Hardy, their attorney:

Plaintiff having filed its verified complaint and a motion for preliminary injunction, together with affidavits of Sidney Elster, Oscar Stein, Harold K. Robertson, Kenneth Wood, James R. Delany and Stephen J. Clifford, and exhibits attached thereto and good cause appearing:

It Is Hereby Ordered that said defendants Antone Pagliero, Arthur Pagliero and John Pagliero, doing business as Technical Porcelain & Chinaware Co. and Antone Pagliero, Mary Jean Pagliero and Delina Pagliero, doing business as Pyramid Alloy Manufacturing Co., and Henry G. Hardy, their attorney, appear before this Court at 10:00 a.m. on June 7, 1951, then and there to show cause, if any they and each of them and their agents, representatives, employees, and those acting in concert with them should not be restrained and enjoined during the pendency of this action from manufacturing, selling, offering for sale, exhibiting, advertising or promoting the sale of patterns of china under the trade-names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" or similar

in appearance to patterns known by such trade-names and exemplified by Exhibits 3, 9, 11 and 13 on file herein.

It Is Further Ordered that a copy of the complaint and motion for preliminary injunction on file herein and of this Order be served on said defendants and their counsel forthwith.

Dated this 31st day of May, 1951.

/s/ EDWARD P. MURPHY,  
United States District Judge.

[Endorsed]: Filed May 31, 1951.

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[Title of District Court and Cause.]

### AFFIDAVIT OF ANTONE PAGLIERO

State of California,  
City and County of San Francisco—ss.

Antone Pagliero, being first duly sworn on oath, deposes and says that

1. He is one of the two Defendants named in the above-entitled case, which has been served with process herein.

2. He is one of the partners doing business as Pyramid Alloy Manufacturing Co., (the other named partners not having been served with process herein) and states of his own knowledge that the partnership known as Pyramid Alloy Manufacturing Co. has never sold or offered for sale any hotel china or other china suitable for such purposes

under the names "Shadowleaf," "Magnolia" or "Hibiscus."

3. That among other reasons, Pyramid Alloy Manufacturing Co. was formed October 29, 1947, as a sales organization for the products manufactured by Technical Porcelain and Chinaware Co. (hereinafter referred to as "Tepco") and that said business was abandoned as of August 1, 1949, in accordance with the attached letter marked Exhibit A which was sent to the trade throughout the United States prior to August 1, 1949.

4. This affiant states that the hotel china known in the trade as "Tweed" represents a design which has been used and manufactured by Tepco long prior to the year 1947, and is the identical design of dinnerware known as "Tweed" now manufactured by Tepco and sold under the name "Tweed"; further affiant sayeth not.

/s/ ANTONE PAGLIERO.

Subscribed and sworn before me this sixth day of June, 1951.

[Seal]      /s/ FRANCES R. WIENER,  
Notary Public.

My Term Expires February 17, 1954.

## EXHIBIT "A"

Pyramid Alloy Manufacturing Co.

6416 Manila Street

Contra Costa County

El Cerrito, California

Gentlemen:

This letter is conveying a message of dual purpose and we trust you will welcome it with the understanding which is most fitting for the present situation.

First: For the past year and a half it has been our pleasure serving you and we want to express our appreciation for your past patronage.

The Pyramid Alloy Manufacturing Co. was organized to serve as a Sales Division and for the sole purpose of giving better service, thus creating goodwill and naturally bringing us closer to each jobber. It was our intention to distribute a super product, which was in process at that time. However, time has its own way of changing events.

Second: With the retarding of sales, we like many others found it necessary to meet this condition by reducing force, curtailing routine and eliminating that which was not absolutely necessary, consequently we are removing the Pyramid Alloy Manufacturing Co. from our pages of history as of August 1, 1949, and turning back to the originators, Technical Porcelain & Chinaware Co., nationally known manufacturers of "Tepco Vitrified China." Also, the super products previously referred to, which will be known as "Pamco Oven Ware," taken over by them.



Beginning August 1, please address all correspondence and orders to the Technical Porcelain & Chinaware Co. Orders now in our possession will be filled in the usual manner until such time as they are completed in their entirety. Payments on orders filled after August 1, will be made to Technical Porcelain & Chinaware Co., but orders filled before that date will be payable to Pyramid Alloy Manufacturing Co.

All prices and discount sheets will remain the same. The packing department has added a new feature to accommodate you, by packing in cartons specially constructed for the various types of ware. Prices on cartons will be notated on price list now being printed for Technical Porcelain & Chinaware Co.

In closing may we express hope that we will not only have your cooperation, but your full support.

Very truly yours,

PYRAMID ALLOY  
MANUFACTURING CO.

.....,

Antone A. Pagliero,  
Co-Partner.

LD:mjp

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Cause.]

## AFFIDAVIT OF ARTHUR PAGLIERO

State of California,

City & County of San Francisco—ss.

Arthur Pagliero, being first duly sworn on oath, deposes and says that he is one of the Defendants named in the above-entitled case and that he is one of the partners doing business as Technical Porcelain and Chinaware Co. at 6416 Manila Street, El Cerrito, California, and states the facts to be as follows:

1. That he has read the bill of complaint herein, the motion for preliminary injunction, the affidavits filed in support of said preliminary injunction and has examined the several exhibits alleged to illustrate the statements therein and categorically denies each and all of said statements and allegations as being untrue and not founded upon facts.

2. He has literally spent his entire life in the vitrified chinaware industry as his father started the first vitrified china plant on the Pacific Coast in the City of Richmond in 1910 and has been continuously engaged in this industry since that time; he is now Production Manager for the Technical Porcelain and Chinaware Co.—hereinafter referred to as “Tepco”—and has charge of all phases of production in the Tepco plant, including mixes, charges, formulas, patterns, testing, analysis of raw materials, laboratory, and he, with his brother

determines the designs which are to be selected for production together with the amount thereof.

3. He is familiar with all types, and machines useful in connection therewith, of means for decorating hotel china and the like, and that several methods of decoration are daily practiced in the Tepco plants; one of the methods being used in the Tepco plant is the so-called transfer method where the artist's hand-drawn design is etched photomechanically upon the outer surface of a metal cylinder in accordance with the standard methods of photoengraving in the printing industry, the cylinder being used to print the design pattern on a thin paper so that suitably cut-out portions of such transfer may then be applied to the china-ware prior to the glazing and then fired so that the pattern becomes an integral and inseparable part of the ware showing through the transparent glaze and that such methods and practice has been carried on throughout this affiant's entire life and for many years prior thereto. This affiant states that such method was not originated by Wallace China Company, Inc., and is used by every china manufacturer in this country and many in England.

4. All over patterns of the type described in said Affidavits and particularly the Affidavit of Kenneth O. Wood, President of Wallace China Co., Ltd., and referred to in the other Affidavits, was not originated by Wallace China Co., Ltd., but has, in fact, been used for many years by other manufacturers of hotel china such as Mayer China Co.

of Beaver Falls, Pennsylvania, as exemplified by the piece of china—vitrified hotel ware marked Exhibit “B” which is referred to herein, and which piece of china has been in this affiant’s possession for more than four years prior to the date hereof. A further example of an allover pattern is illustrated by the advertisement of John Shaw and Sons, England, showing a chintz design in “Pottery and Glass” for April, 1950; this design has been on the market for several years prior to the date of said advertisement; that a pattern known as “rose chintz” of an allover design in a single color is further illustrated in the “Montgomery Ward” catalog for the year 1951, although this same design has been available for many years prior thereto. There have been numerous other allover patterns of very old designs such as the blue “Willow Ware” and the “Meissen” onion design, which designs themselves are over a hundred years old. Accordingly, it is not possible for Wallace China Co., Ltd., to even claim to be the originator of allover patterns for vitrified hotel china or the originator for allover patterns for any china.

5. Tepco employs its own artists to prepare the original drawings from which the cylinders are made and the artist which was employed to make the so-called “Shadowleaf” design, the “Hibiscus” design and the “Magnolia” design, although a resident of Los Angeles is presently on a trip in the East and unavailable for consultation at this time; further, it is not known exactly when he will re-

turn, but he is not expected to return for at least another two weeks.

6. The cylinders used by Tepco for the pattern known in the trade as "Tweed" was made by an artist many years ago whose name has been forgotten and the records of which in Tepco have now been destroyed in a fire. The artist was one who was employed by the "New Method Engraving Co." which made the original cylinder for this pattern and which company has discontinued engraving pottery cylinders since about 1946.

7. The engraving of pottery cylinders is a specialized field and since 1949 and in the Fall of that year, the cylinders have been made for Tepco by Garnier Engraving Company of Los Angeles. This affiant is informed and believes that the Garnier Engraving Co. also engraves pottery cylinders for other companies including Wallace China Co., Ltd., Vernon Pottery Co., Gladding McBean and numerous others. Between the years 1946 and the Fall of 1949, cylinders were made for Tepco by Graphic Arts of San Francisco.

8. At no time has Tepco used or employed any original art work belonging to or the property of Wallace China Co., Ltd., and similarly it has not used or employed any cylinders belonging to or the property of Wallace China Co., Ltd.

9. It has long been the practice in the production of vitrified hotel china for the several companies engaged in this industry all over the United



States and elsewhere, to offer for sale and produce designs either identical with or very similar to those of other manufacturers except in cases where the design has been either patented or copyrighted and that both Wallace China Co., Ltd., and Tepco have been engaged in this practice with the others for a period of many years, and that such practice is standard for this industry.

10. That Tepco china and particularly its vitrified hotel ware is made to meet the standards set up in the federal specifications for chinaware; vitrified No. M-C-301a April 21, 1943, as are all the other hotel vitrified china made by other manufacturers including Wallace China Co., Ltd.; that Tepco ware meets all of the standards and requirements of this specification and more so, and has been accepted for use by the United States Navy, the Marine Corps, the United States Army and the United States Air Forces. Tepco received the "Certificate of Achievement" for excellence in production and performance during World War II, which certificate was signed by the Assistant Secretary of the Navy, Mr. Hensell.

11. Tepco and Tepco products enjoy a fine reputation in the industry and with the public, which is quite as high as anything Wallace China Co., Ltd., can claim.

12. This affiant states that all vitrified hotel ware put out by Tepco has either the trade-mark Tepco or some other trade-mark of Tepco stamped

under the glaze and forming an integral part thereof showing it as the source of origin, with the possible exception of some small individual butters and creamers. That such marks have long been used in the industry and considered as adequate means for identifying the manufacturer. The public is thoroughly familiar with this means of identifying the source of origin.

13. Tepco is jealous of its position in the industry and purchasing public and has never and would not now permit its products, no matter of the design, to be passed off as and for the product of another manufacturer.

14. Tepco has no intention of and is not going to exhibit any of its products in Houston, Texas, in June of 1951. If any such decision had been made this affiant would have known and would have participated in it.

Further affiant sayeth not.

/s/ ARTHUR PAGLIERO.

Subscribed and sworn before me this 6th day of June, 1951.

[Seal]     /s/ FRANCES R. WIENER,  
Notary Public in and for the City & County of San  
Francisco, State of California.

My Commission Expires February 17, 1954.

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Cause.]

## AFFIDAVIT OF ANTONE PAGLIERO

State of California,

City and County of San Francisco—ss.

Antone A. Pagliero, being first duly sworn on oath, deposes and says that he is one of the defendants in the above-entitled action named as a partner doing business as Technical Porcelain and China-ware Co., and makes this Affidavit in opposition to the Motion for Preliminary Injunction, stating the facts to be as follows:

1. He has read the Motion for Preliminary Injunction, the Bill of Complaint herein, and the several Affidavits tendered in support of said Preliminary Injunction, and has examined the exhibits accompanying the same and he hereby denies the alleged facts and inferences as set forth therein or intended so to be as not being founded upon fact or truth, to the best of his knowledge and belief.

2. He was literally born and raised in the vitrified china industry and started soliciting the trade and selling electrical insulators, heat resisting porcelain articles and hotel vitrified china covering the entire United States and Canada, when he was 14 years old. He is presently in charge of all sales for Technical Porcelain and Chinaware Co. which is hereinafter referred to as "Tepco," and that he is the only one who contacts the dealers and distributors for Tepco hotel vitrified chinaware, with the exception of the Los Angeles area, at which

location Mrs. Marge Cheever has been employed for the last ten years and is in charge of the Los Angeles warehouse and office.

3. He is thoroughly conversant with all phases of selling and merchandising in this industry and is entirely familiar with the products and competing lines made by other manufacturers made in the United States, Canada and elsewhere. Tepco does not sell to consumers, but sells only to jobbers and dealers for resale and in this connection, this affiant contacts the Tepco jobbers and dealers throughout the United States and in the Los Angeles area in conjunction with Mrs. Cheever. This affiant in selling Tepco products for twenty-eight years has never knocked a competitor, run down their personnel, or their products, or in any other way disparaged his competition on the theory that every knock is a boost and that he was only interested in selling Tepco products. That having learned the hard way that this is the best policy, he personally enjoys the respect and hospitality of the majority of his customers and that both the Tepco products and he personally have an excellent personal relationship and reputation with all of his customers. The fine reputation and good will of Tepco and its products is best expressed by the fact that since the founding of Tepco in 1920, its business has increased year by year steadily up to the present time.

4. Tepco has one of the most modern and up-to-date plants for the manufacture of vitrified hotel

china in the United States and the standards to which its products are required to adhere meet all Government specifications with a good margin beyond the minimum requirements.

5. That it is common practice to publish discount sheets in the sale of vitrified hotel china and that this practice was established and originated in the industry through this affiant's efforts commencing in 1932. Such practice has been adopted by the entire industry and persists up to the present time.

6. That it has been common practice in the industry for the several firms engaged therein to duplicate or approximate designs and patterns used by another or other manufacturers and that this practice has been followed by Wallace China Co., Ltd. and Tepco as well as the other manufacturers, and that the same or similar code numbers or words are used to designate the particular design; for example, L-100 is recognized throughout the industry as a pin line decoration, L-101 as marigold decoration, L-104 as a green band and line. Tepco identifies its products by such references and so does Wallace China Co., Ltd. While Tepco has never followed the policy of having exclusive distributors, this situation as well as the fact that it is common practice for manufacturers or similar designs such as Tepco "Mohawk" and Wallace China Co., Ltd.'s "Del Mar" patterns brought about the writing of the letter dated September 13, 1937, by the then sales manager for Wallace China



Co., Ltd. to Smiths Hotel and Bar Supply Co. of San Diego, the said letter being given this affiant by Mr. R. W. Smith of the said supply company. The letter clearly recognizes that the copying and simulation of designs for vitrified hotel ware as early as 1937 were so close that the dealer could mix two lines when filling an order.

7. This affiant states that the practice in the trade of using the same or similar designs when the same are not protected either by copyright or patent justifies any copying which is indulged in by both the plaintiff and the defendant in this case.

8. Copying and simulation of designs has grown up in the industry because of public demand. For example, a restaurant may be completely supplied with a design for vitreous hotel ware made by Wallace China Co., Ltd. or any other manufacturer and some dispute or disagreement may arise with the local distributor or dealer for that manufacturer. The customer wants to get lines and ware which will fit in with his then pattern from another source and it may very well be that a dealer or distributor for Tepco would say he could get this order if the pattern can be duplicated or simulated, which is done. The customer and the public are happy because they are not bound to a single source of supply which could hold them up as to price, delivery or any other reason which would make competition impossible. The practice of copying and simulation of designs is well established in this industry and its practice is fully justified and accepted in the trade with the public getting the benefit

thereof. Such copying and simulation of designs in the trade is limited to unpatented and uncopyrighted designs as statutory rights are respected by all manufacturers.

9. All of the Tepco designs have been created by artists employed by Tepco which includes the design alleged to be "Shadowleaf," "Magnolia," "Hibiscus" and "Tweed." The "Tweed" design has been used by Tepco for many years and long prior to any use claimed or alleged by Wallace China Co., Ltd. and therefore, this design has been copied by Wallace from Tepco rather than vice versa as alleged. Accordingly, Tepco has a cause of action against Wallace China Co., Ltd. on the same basis that is alleged in this case. The "Magnolia" design is known as "Dixie" in the Tepco line and the only resemblance is that both depict a magnolia blossom. The "Hibiscus" pattern which is called "Hawaiian" in the Tepco line only resembles the Hibiscus of the Wallace line in that it is a representation of a hibiscus blossom. The "Shadowleaf" pattern so-called which is called "Palm Leaf" in the line as well as "Shadowleaf" resemble each other because they are representations of actual tropical leaves. Each of these names is descriptive of the design and such descriptive names belongs to everyone including Tepco and cannot be the property of Wallace China Co., Ltd. exclusively. The names denote the designs, not the manufacturer and therefore cannot be trade-marks.

10. There has never been a piece of china put

out by Tepco without the name "Tepco" on it or other trade-mark indicating "Technical Porcelain and Chinaware Co." as the source of origin, with the possible exception of small individual creamers and butters. The trade-mark "Tepco" and other indications of origin in Tepco are placed on the bottom of each article prior to glazing and become an integral part of the china after each individual has passed through the kiln so that there is no possibility of removing or altering the trade-mark. Such methods and means of identifying the origin of each piece has always been considered as entirely adequate means for identifying the source and origin of each piece of chinaware; the trade and the public have for many years been schooled in the identification of chinaware by this means.

11. To the best of this affiant's knowledge and belief there has never been a piece of Tepco china, regardless of its design, shape or color, which has been sold as, for or represented as made by any other manufacturer including Wallace China Co., Ltd. Three generations of this affiant's family are, and have been engaged in the manufacture, sale and distribution of Tepco ware and are justifiably proud of the record, reputation and integrity of their own product and all are constantly watchful to see that its good name and reputation are maintained.

12. This affiant is advised and Wallace China Co., Ltd., through its counsel, admits that the designs called "Shadowleaf," "Tweed," "Magnolia" and "Hibiscus" are not protected by Design Letters

Patent or by Copyright and that the same have been used and published by Wallace China Co., Ltd. long past the one year of public use in which the designs could have been patented. Likewise, this affiant has been advised and the same has been admitted by counsel for Wallace China Co., Ltd. that the trade-marks, so-called, "Shadowleaf," "Tweed," "Magnolia" and "Hibiscus" are not registered either in the United States Patent Office or in the State of California.

13. Tepco uses two forms of shipping containers, (1) cartons and (2) barrels. The cartons used are standard cartons of standard specifications for this industry and carry the name "Tepco China Co." with the usual standard blanks for identifying the contents. At the present time and for several months last past, the cartons being used also carry another trade-mark adopted and exclusively owned by Tepco entitled "Western Traveler" with a design representing a stage coach drawn by horses. This design also carries the identifying word "Tepco." If one can read, there is no possible way to confuse the Tepco carton with the carton of Wallace China Co., Ltd. or any other manufacturer using a similar standard form.

14. This affiant states that in his own knowledge acquired through years of experience in the industry, that the allover pattern design for hotel vitrified china made with transfers from engraved cylinders was not introduced and first used by Wallace China Co., Ltd., but has been used by many



other firms long prior to Wallace's first claimed use in 1948.

15. To the best of this affiant's knowledge and belief, the so-called "Shadowleaf" design was not originated by Wallace China Co., Ltd., but was taken directly from a fabric design without change and that this affiant was aware of said fabric design and advertisements representing it and that this affiant saw them in June or July of 1950. He made a clipping of such advertisements and although he has instituted a diligent search therefor, he has not been able to locate the same to date.

16. That Tepco does not intend to exhibit any of its wares at the show to be held during June of 1951 at the Shamrock Hotel in Houston, Texas, i.e., The Texas and Southwestern Regional Restaurant Show, and that if Tepco had so intended and was so going to exhibit, he would have known and would have participated in such a decision; further, it is now too late to establish any kind of exhibit or secure space for such show.

Further affiant sayeth not.

/s/ ANTONE A. PAGLIERO.

Subscribed and sworn before me this 6th day of June, 1951.

/s/ FRANCES R. WIENER,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires February 17, 1954.

[Endorsed]: Filed June 7, 1951.



[Title of District Court and Cause.]

ORDER

Pursuant to stipulation of counsel it is hereby ordered that the action be dismissed as to Pyramid Alloy Manufacturing Co., subject to reinstatement of the action upon the trial, if warranted by the facts then and there adduced.

Dated June 7, 1951.

/s/ EDWARD P. MURPHY,  
United States District Judge.

[Endorsed]: Filed June 7, 1951.

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[Title of District Court and Cause.]

ORDER

Good Cause Appearing Therefor, let the preliminary injunction issue as prayed for in the motion.

It Is Further Ordered that the attorneys for plaintiff prepare the form of the injunction.

Dated June 7, 1951.

/s/ EDWARD P. MURPHY,  
United States District Judge.

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's Motion for Preliminary Injunction having on June 7, 1951, come on regularly for hearing in open court, plaintiff having been represented by C. A. Miketta, of Los Angeles, California, and Jas. M. Naylor, of Naylor and Lassagne, San Francisco, California, and defendants having been represented by Henry Gifford Hardy and Edward B. Gregg, both of San Francisco, California, upon the Verified Complaint, affidavits, certain physical exhibits, and testimony in open court, the matter having been fully argued and submitted, the Court, for the purposes of plaintiff's aforesaid Motion for Preliminary Injunction and on the record presently before the Court, now makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure and Rule 5(e) of the Rules of Practice of the District Court of the United States for the Northern District of California:

### Findings of Fact

1. Plaintiff, Wallace China Co., Ltd., is a corporation organized and existing under and by virtue of the laws of the State of California and has an established place of business at Huntington Park, Vernon, County of Los Angeles, California, adjacent the City of Los Angeles.

2. That the defendants, Antone Pagliero, Arthur

Pagliero and John Pagliero, are residents of the Northern District of California and general partners doing business as Technical Porcelain & Chinaware Co., with an established office and plant at 6416 Manila Avenue, El Cerrito, Contra Costa County, State of California, and that of these named defendantas John Pagliero has not yet been served with Summons and a copy of the Complaint or the Order to Show Cause issued May 31, 1951, or Plaintiff's Motion for a Preliminary Injunction.

3. That defendants, Antone Pagliero, Mary Jean Pagliero and Delina Pagliero, are partners under the name and style Pyramid Alloy Manufacturing Co., but defendants represent that they ceased doing business in the selling of chinaware prior to August 1, 1949, and it was stipulated by counsel at the hearing that the action may be dismissed as to said Pyramid Alloy Manufacturing Co., subject to reinstatement of the action upon the trial, if warranted by the facts hereafter adduced.

4. That plaintiff is engaged in the manufacture and sale of vitrified hotel china throughout the western part of the United States of America and the Territory of Hawaii, and ships its products in interstate commerce.

5. That in the course of its business plaintiff has adopted and used as trade names or trade marks to indicate china of its manufacture the notations "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia," said trade-marks have not been registered under any Federal Act or under the Laws of the

State of California, and the said trade names and trade marks have been applied by plaintiff to containers in which said china is shipped and sold in interstate and intrastate commerce.

6. That plaintiff has caused to be prepared for it certain original patterns and vitrified hotel china incorporating said patterns have been manufactured and sold by plaintiff under the identifying trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia;" that said patterns are exemplified by Exhibits 3, 9, 11 and 13 appended to the Motion for Preliminary Injunction. None of said decorative patterns has been copyrighted or protected by Design Letters Patent and the time for doing so has passed. That plaintiff's said trade names represent plaintiff's good will and reputation; that the said patterns are known to and recognized by the trade as indicating china originating with plaintiff.

7. That the defendants have caused the aforesaid "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" patterns to be copied and imitated and have incorporated such copies into vitrified hotel china manufactured and sold by them in intrastate and interstate commerce.

8. That the defendants, in offering for sale and selling said vitrified hotel china embodying copies of plaintiff's aforesaid designs, have identified such goods by employing plaintiff's aforesaid trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia," and have caused said

trade names or trade marks to be used in price lists and discount sheets and to be affixed to shipping containers containing defendants' said goods.

9. That plaintiff gave the defendants written notice of unfair competition and infringement under date of May 5, 1951, and despite said notice defendants have continued to manufacture and sell vitrified hotel china embodying the aforesaid copies of plaintiff's patterns and the use of the trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus" and Magnolia" in the identification of the same.

### Conclusions of Law

#### I.

That plaintiff is the owner of the trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" as applied to hotel china and is entitled to the exclusive use thereof as against these defendants.

#### II.

That plaintiff is the owner of the distinctive patterns identified by the trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" exemplified by Exhibits 3, 9, 11 and 13 appended to the Motion for Preliminary Injunction, and is entitled to the exclusive right to incorporate said patterns in hotel china as against the defendants.

#### III.

That this Court has jurisdiction of this cause under the Lanham Act, 15 USCA, Secs. 1051-1127



and under the Paris Convention and the Inter-American Convention.

IV.

That the defendants, by manufacturing, advertising and selling hotel china under the trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia," have infringed plaintiff's rights therein and have competed unfairly with the plaintiff.

V.

That the defendants, by copying and imitating plaintiff's patterns identified by the trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" and exemplified by Exhibits 3, 9, 11 and 13 of record herein, and by manufacturing and selling hotel china incorporating the same, have competed unfairly with the plaintiff.

VI.

That plaintiff is entitled to a judgment against the defendants, Antone Pagliero and Arthur Pagliero, as copartners, with John Pagliero, doing business as Technical Porcelain & Chinaware Co., awarding plaintiff a preliminary injunction to be issued out of and under the seal of this Court enjoining the said defendants and each of them, their agents, representatives, attorneys, servants and those persons acting in privity, participation and concert with *the*, who receive notice of such judgment by personal service or otherwise, from infringing plaintiff's rights in any manner and from making and causing to be made, selling, offering

for sale, advertising, exhibiting, marketing or otherwise disposing of china bearing patterns deceptively similar to those originated by plaintiff, said patterns being exemplified by Exhibits 3, 9, 11 and 13 of record in this action, and from using plaintiff's trade names or trade marks "Shadow-leaf," "Tweed," "Hibiscus" and "Magnolia" in the identification of hotel chinaware manufactured and sold by the defendants.

VII.

That the action be dismissed as to Pyramid Alloy Manufacturing Co. subject to reinstatement of the action upon the trial hereof if warranted by the facts then and there adduced.

Dated June 20, 1951.

EDWARD P. MURPHY,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 20, 1951.

In the United States District Court, Northern  
District of California, Southern Division

Civil Action No. 30595

WALLACE CHINA CO., LTD.,

Plaintiff,

vs.

ANTONE PAGLIERO, ARTHUR PAGLIERO  
and JOHN PAGLIERO, Doing Business as  
TECHNICAL PORCELAIN & CHINA-  
WARE CO., and ANTONE PAGLIERO,  
MARY JEAN PAGLIERO and DELINA  
PAGLIERO, Doing Business as PYRAMID  
ALLOY MANUFACTURING CO.,

Defendants.

### JUDGMENT

Plaintiff's Motion for Preliminary Injunction having come on for hearing upon the verified Complaint, affidavits, certain physical exhibits and testimony in open court and the Court having filed its Findings of Fact and Conclusions of Law, for the purposes of plaintiff's aforesaid Motion for Preliminary Injunction, it is hereby ordered.

1. That plaintiff, Wallace China Co., Ltd., is a corporation organized and existing under and by virtue of the laws of the State of California and has an established place of business at Huntington Park, Vernon County of Los Angeles, California adjacent the City of Los Angeles.

2. That the defendants, Antone Pagliero and Arthur Pagliero, are residents of the Northern District of California and, with John Pagliero, a resident of the said district, are general partners doing business as Technical Porcelain and China-ware Co., with an established office and plant at 6416 Manila Avenue, El Cerrito, Contra Costa County, State of California.

3. That this Court has jurisdiction of this cause and of the parties under the Lanham Act, 15 USCA, Secs. 1051-1127 and under the Paris Convention and under the Inter-American Convention.

4. That as between the parties hereto plaintiff is the owner of the trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" as used upon hotel chinaware.

5. That as between the parties hereto plaintiff is the owner of the hotel chinaware patterns indicated by plaintiff by the trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus," and "Magnolia" and exemplified by Exhibits 3, 9, 11 and 13 appended to the Motion for Preliminary Injunction.

6. That defendants have competed unfairly with plaintiff and have infringed plaintiff's trade names or trade-marks.

7. That plaintiff's Motion for Preliminary Injunction be and the same is hereby granted as to the defendants, Antone Pagliero and Arthur Pagliero, general partners doing business with John Pagliero as Technical Porcelain and Chinaware Co.

8. That a writ of preliminary injunction issue out of and under the seal of this Court enjoining the defendants, Antone Pagliero and Arthur Pagliero, and each of them, their agents, representatives, attorneys, servants and those persons acting in privity, participation, and concert with them who receive notice of this judgment by personal service or otherwise, from infringing plaintiff's rights in any manner and from making and causing to be made, selling, offering for sale, advertising, exhibiting, marketing or otherwise disposing of china bearing patterns deceptively similar to those originated by plaintiff, said patterns being exemplified by Exhibits 3, 9, 11 and 13 of record in this action, and from using plaintiff's trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" in the identification of hotel chinaware manufactured and sold by the defendants.

9. That pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiff is hereby required to file a bond in the amount of \$3,000.00 as a condition precedent to the issuance of the preliminary injunction herein granted.

Dated June 20, 1951.

/s/ EDWARD P. MURPHY,  
United States District Judge.



## Acknowledgment of Service

Receipt of a copy of the foregoing Judgment is hereby acknowledged this 20th day of June, 1951.

/s/ HENRY GIFFORD HARDY,  
Attorney for Defendants.

[Endorsed]: Filed June 20, 1951.

Entered June 21, 1951.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF  
APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that Antone Pagliero and Arthur Pagliero, Defendants above-named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment entered herein on June 21, 1951.

Attorneys for Appellants:

HAUERKEN & ST. CLAIR,  
/s/ HENRY GIFFORD HARDY.

[Endorsed]: Filed June 26, 1951.

[Title of District Court and Cause.]

MOTION FOR SUPERSEDEAS AND STAY  
OF EXECUTION PENDING APPEAL

Defendants, Antone Pagliero and Arthur Pagliero, move this Court for an order staying execution of the judgment entered herein on June 21, 1951, including the lifting of the Preliminary Injunction which issued in accordance therewith, pending the appeal by Defendants to the Court of Appeals for the Ninth Circuit, the said Notice of Appeal having been filed June 26, 1951, pursuant to Rule 62(d) of the Federal Rules of Civil Procedure. The Affidavit of Henry Gifford Hardy is filed herewith in support of this Motion.

Respectfully submitted,

HAUERKEN & ST. CLAIR,

HENRY GIFFORD HARDY,

By /s/ HENRY GIFFORD HARDY,  
Attorneys for Defendants.

[Endorsed]: Filed June 28, 1951.

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[Title of District Court and Cause.]

ORDER GRANTING SUPERSEDEAS

This cause came on to be heard on motion of Defendants, Antone A. Pagliero and Arthur J. Pagliero, pending Defendants' appeal to the Court of Appeals for the Ninth Circuit pursuant to Notice

of Appeal filed herein, and it appearing to the Court that Defendants are entitled to such stay:

It Is Ordered that the execution of and any proceedings to enforce the Judgment entered herein on the 21st day of June, 1951, shall be stayed pending the termination of Defendants' appeal from said Judgment, upon the filing by Defendants and approval of this Court, of a bond in the sum of \$10,000.00 with sufficient sureties, conditioned as required by Rule 73(d) of the Federal Rules of Civil Procedure, and otherwise as required by law.

Dated August 28, 1951.

/s/ EDWARD P. MURPHY,  
United States District Judge.

[Endorsed]: Filed August 28, 1951.

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[Title of District Court and Cause.]

#### DEPOSIT IN LIEU OF SUPERSEDEAS BOND

Know All Men by These Presents, that Antone Pagliero, and Arthur Pagliero, doing business as Technical Porcelain and Chinaware Co., have deposited with the Clerk of this Court in lieu of a Supersedeas Bond, the following treasury bonds.

TB. No. 6016F      \$5,000.00      2%      1952-54  
(Coupons Nos. 14 to 20, both inclusive,  
attached.)

TB. No. 5632B      \$5,000.00      2%      1952-54  
(Coupons Nos. 14 to 20, both inclusive,  
attached.)

in total sum of Ten Thousand Seven Hundred (\$10,700.00) Dollars, to be paid to the said Wallace China Co., Ltd., its successors and assigns; to which payment, well and truly to be made, we agree.

Whereas, on the 21st day of June, 1951, in an action pending in the United States District Court for the Northern District of California, Southern Division, between Wallace China Co., Ltd., a corporation, as Plaintiff, and Antone Pagliero, and Arthur Pagliero, doing business as Technical Porcelain and Chinaware Co., as Defendants, a judgment was rendered against said Antone Pagliero and Arthur Pagliero, doing business as Technical Porcelain and Chinaware Co., Defendants, and the said Defendants having filed a Notice of Appeal from such judgment to the Court of Appeals for the Ninth Circuit:

Now, the condition of this payment is such that if the said Defendants, shall prosecute this appeal to effect and shall satisfy the Judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the Judgment is affirmed, or shall satisfy in full such modification of the Judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation and payment shall be void; otherwise to remain in full force and effect.

In consideration of the premises, we hereby consent and agree to all laws, rules and regulations of the United States of America, or any depart-

ment thereof regarding the posting and forfeiture of the United States bonds as surety.

ANTONE PAGLIERO, and ARTHUR PAGLIERO, Doing Business as Technical Porcelain and Chinaware Co.,

By /s/ ANTONE PAGLIERO,  
Copartner.

I hereby approve of the foregoing this 30th day of August, 1951.

/s/ EDWARD P. MURPHY,  
U. S. District Judge.

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Received from Technical Porcelain & Chinaware Co., a copartnership, thru Antone Pagliero, partner, the following Treasury Bonds, deposited in lieu of other surety on the supersedeas bond in the above-entitled case:

One \$5,000.00 2% Treasury Bond, 1952/54, #6016F  
Coupons 14 to 20.

One \$5,000.00 2% Treasury Bond, 1952/54, #5632B  
Coupons 14 to 20.

August 30, 1951.

C. W. CALBREATH,  
Clerk.

[Endorsed]: Filed August 30, 1951.



In the District Court of the United States for the  
Northern District of California, Southern  
Division

No. 30595

Before: Hon. Edward P. Murphy, Judge.

WALLACE CHINA CO., LTD.,

Plaintiff,

vs.

ANTONE PAGLIERO, et al.,

Defendant.

REPORTER'S TRANSCRIPT

ORDER TO SHOW CAUSE

Appearances:

For the Plaintiff:

CASIMER A. MIKETTA, ESQ., and  
JAMES NAYLOR, ESQ.

For the Defendant:

HENRY GIFFORD HARDY, ESQ.

June 7, 1951, 10:00 A.M.

The Clerk: Wallace China Company versus  
Pagliero, order to show cause.

Mr. Miketta: Ready, your Honor.

Mr. Hardy: I did not answer ready, your  
Honor. I am here representing two of the defend-  
ants, the only two of the defendants who have been  
served in this case, Mr. Antone Pagliero and Mr.

Arthur Pagliero. We were served with a great mass of papers, points and authorities, and a motion to show cause, which was set by your Honor for this morning. As your Honor, an order such as this is an attempt to try the case on the basis of affidavits without the opportunity of cross-examination. I thought when I received these papers that it involved trade-mark infringement and coupled with that a charge of unfair competition. In checking into this in a preliminary way I was not aware of the case in the Ninth Circuit which is principally relied upon by the plaintiff in this case as to jurisdiction, and without which even they would agree there could be no jurisdiction of this case. That case changed all of the jurisdictional requirements in cases of this kind. It is the one case I know of on the subject under the Lanham Act, and it would take some very careful searching, and I simply have not had time to meet these issues fairly and learn all the facts involved. [2\*]

The affidavits that were filed in here all involve persons who reside in Los Angeles, and when we were served with these papers I asked Mr. Antone Pagliero to go to Los Angeles. He got back from Los Angeles yesterday morning, and in talking with him I knew we could not be adequately prepared to meet these issues this morning, and so I telephoned Mr. Naylor and asked for a reasonable extension of time. Mr. Naylor is not in control of this litigation, and he had to telephone to Los Angeles to relay my request for an extension of time. That request was not granted except with strings at-

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

tached to it that we accept a temporary restraining order without bond until the date of the hearing. That, of course, as your Honor knows, affords me no opportunity to accept an extension of time under those conditions because I do not even believe the Court could grant an injunction or a temporary restraining order in this case properly, and I think as soon as the facts are developed, the Court will agree with me. I do feel that we should have adequate time to prepare for this. Obviously looking at this mass of pleading, and twenty-four pages of authorities cited, that was not prepared in any five days. They had been working on this for some time. We have not had an opportunity to meet these things, and I think that in fairness to my clients and in fairness to the Court, to be able to present these matters, we should have reasonable time to do this. [3]

Now, another thing: In order to show cause like this for a temporary restraining order is really a trial on affidavits. I do not believe Your Honor should hear this thing on affidavits. I think the witnesses ought to be here and subject to examination.

Another thing that my investigation so far indicates is that the only allegation in the complaint, the only support in the affidavits for any urgency in this matter at all is that the defendants may or intend to exhibit the subject matter at a show in Houston, Texas. in the month of June. I have those two men in Court and they will swear under oath that they did not know of this show. They have no

intention of exhibiting in this show and it is too late now to secure any space to exhibit their wares in this show. So it just takes out any urgency in this case.

Another point is I think there are grounds for dismissing this cause of action. In other words, I am entitled to have time to present those facts, and I am entitled to be heard by the Court. That time has not elapsed. I intend to make such a motion. I certainly do not think in the lack of any urgency—this is just like any other trade-mark case or any unfair competition case. There is no other urgency than the one thing that I have stated, the allegation that is the intent to exhibit in the show, and I think that allegation is made in paragraph ten of the plaintiff's motion for preliminary injunction [4] and I would like to read that to Your Honor. It is alleged there that, "time is of the essence because important exhibitions and shows are to be held in the near future at which plaintiff and defendants intend to exhibit their wares. Numerous buyers attend these shows. Defendants should be restrained from unfairly diverting the fruit of plaintiff's good will at these shows and thereby appropriating business which belongs to plaintiff." Then it refers to the affidavits of Mr. Wood, Mr. Delany and Mr. Clifford. If you will refer to those affidavits they refer only to the Texas show which is to be held in June and the San Francisco show, which is to be held in September or October, as I understand it. So there is absolutely no urgency in this case and no reason a preliminary injunc-



tion should issue, and there is no reason why this case should not proceed in the normal manner as any other case.

Mr. Miketta: May I be heard, Your Honor?

The Court: Yes.

Mr. Miketta: In the first place, the two persons actually served are the two primary partners of a three-partner business. The third partner, who happens to be the father, is apparently out of town and could not be located, so that the two partners have been served.

In order that Your Honor know what we are talking about, the plaintiff is engaged in the manufacture and sale of hotel china. One of these happens to be the plaintiff's and the other [5] happens to be the defendant's (exhibiting chinaware). They are sold under exactly the same trade name. Both of them are called "Shadowleaf." The exhibits attached hereto include photostatic copies (and I have the originals if Your Honor wants to look at them), of the price lists published by the defendants, calling these by the name "Shadowleaf" and others by their respective trade names of "Tweed," "Hibiscus," and "Magnolia." In addition to that the defendants, as shown in the affidavits and the exhibits, marked the containers with the trade names, so that there is trade-mark infringement here. A trade-mark represents good will. Good will and reputation take time to build up. The plaintiff has built up a good will and a reputation in its products. That reputation is being irreparably injured, Your Honor, by copies, by the sale of dishes



which not only look alike but are called by the same name. That reputation can be destroyed very, very quickly, particularly at these exhibitions and shows. One of them is in Texas, another will be in San Francisco next month, I believe towards the end of July.

A reputation once destroyed, once damaged, may never be regained sometimes, particularly in view of the fact that in this case, I submit to Your Honor, the defendants have had adequate time to prepare because they were given registered mail notice over a month ago. Mr. Hardy replied and acknowledged and asked for some additional information on May 9th, which I gave [6] him on May 11th, so that since the first part of May they have been on notice. This particular order to show cause was filed a week ago—yes, eight days ago—and it is novel, Your Honor, that at this time, although Mr. Hardy is asking for a continuance, he does not deny a single of the essential allegations upon which we are entitled to an injunction. We have only received this additional urge, you may say, to insist on a preliminary injunction and that is this: Mr. Wood's affidavit, who happens to be the plaintiff's president, states that Mr. Pagliero, the active partner of plaintiff, has threatened to flood the market with these copies and to sell them at a ridiculously low-cost figure unless we laid off, as he put it. Now, that is a statement in the Wood affidavit and I will read it to your Honor. Apparently counsel just ignores it, but there is on page D-7, because I have numbered the affidavits

by letters. D is for Wood, page 7, the last page.

“Deponent states that Antone Pagliero, general partner of Tepco, has been notified of his said unlawful copying of Wallace China, Ltd., patterns and trade names, but refused to cease said acts of infringement and unfair competition and, instead, has personally told the deponent that in the event Wallace China Company, Ltd., were to bring the suit against Tepco, Tepco would drastically reduce prices on the copied patterns of china with the purpose and intent to thereby prevent Wallace China [7] Co., Ltd., from being able to sell its china at a reasonable profit.”

And incidentally, by doing so, Your Honor, he would just wreck, irreparably damage and injure the reputation, the good will, the meaning which these particular patterns, and trade names have acquired in the trade.

I am not going into the merits, but it seems to me at this time, Your Honor, that the affidavits are before you. The affidavits very clearly and definitely show, with exhibits—and I am willing to introduce physical exhibits, Your Honor, to supplant the photostats—that there has been trademark infringement, there has been copying of the appearance of this china—and incidentally, all china is sold by appearance—there has been damage, and everything that is necessary is here. The authorities clearly and definitely show that in a case of this sort the Court will find fraudulent intent, because

with the entire dictionary available, why do they choose the same trade names? With artistry available to others, why do they copy our patterns? Only for the purpose of depriving the plaintiff of its business, of reaping the benefits where they have not sown, and of the damaging our good will and reputation and business, as it has already been damaged, Your Honor.

We feel that it is essential that a preliminary injunction issue, particularly in view of the threat by the partner of [8] plaintiff, and the authorities very clearly and definitely show that injunctions should be granted by the Courts in cases of unfair competition and trade-mark infringement as here. Perhaps Your Honor would like to glance at two pages of the authorities.

Mr. Hardy: May I interrupt? I presented here a motion for continuance, and as Your Honor knows, I did not argue any of the merits.

The Court: I will dispose of that right now. You have had notice of this litigation, or at least there was about to be pending some sort of litigation, in the event this matter could not be disposed of since the early part of May; is there any denial of that?

Mr. Hardy: They gave the formal notice of infringement. I wrote back and asked for further information. That information that I requested there was, "Are these trade-marks registered? Are the designs either copyrighted or otherwise protected by design patent?" They wrote back and said the names were not registered. They have no stand-

ing here in Court whatever. The designs were not protected by copyright or design patent, and normally this Court would not have jurisdiction of such a subject matter. Now, the only possible reason that the Court has jurisdiction here at all—and I do not think Mr. Miketta will deny this a bit—is the reasoning of the Court of Appeals for the Ninth Circuit in the case [9] of Stauffer versus Exley. Stauffer versus Exley is the leading case and the controlling case. It is the only case in the country of its kind. It completely abolishes every rule of jurisdiction over such matters.

Mr. Miketta: Oh, no, Your Honor.

The Court: Well, let us dispose of the continuance first. I am going to deny the motion for continuance. If you wish to proceed at this time, you may do so. Let us get into the merits of your petition.

Mr. Hardy: Then I would like, if Your Honor is requiring me to proceed at this time, to file the affidavits in this case that have been prepared when I was refused the courtesy of an extension of time by counsel.

The Court: They may be filed.

Mr. Miketta: That did not come until yesterday morning, Your Honor, and I was already on my way.

Mr. Hardy: You were not on your way then and you know it.

Mr. Miketta: No; not physically, but I was closing up my office to get out.

Mr. Hardy: I would like to file at this time the



affidavit of Arthur Pagliero, and I will give counsel two copies of the same. Does the Court require an extra copy?

The Court: One copy is enough.

Mr. Hardy: Also I would like to file at this time an affidavit of Antone Pagliero as a partner in one defendant, [10] Technical Porcelain & Chinaware Company. I delivered to counsel two copies of this affidavit. And a third affidavit, which is also by Mr. Antone Pagliero as a partner in Pyramid Alloy Manufacturing Co., and I am delivering to counsel two copies of that.

There is one preliminary matter I should like to take up first, Your Honor, and that is involved in the affidavit of Antone Pagliero on behalf of Pyramid Alloy. Pyramid Alloy is a partnership. The partnership has not been dissolved but it has ceased to do business, and the trade was notified by the letter which is attached to it and marked Exhibit A. There is no reason at all for the Pyramid Alloy partnership being involved in this litigation whatever. It is not doing any business. It has not sold any of the products, and I have Mr. Pagliero here to state that fact and confirm it, and he can be subjected to cross-examination if Your Honor desires.

The Court: What is your disposition with respect to that, Mr. Miketta?

Mr. Miketta: May it please the Court, the reason we included the Pyramid Alloy Manufacturing Company is that we have and our dealers have received price lists bearing the name "Pyramid



Alloy Manufacturing Company of El Cerrito, California." They are located at the same address. These were received as late as February 26, 1951, and they carry on them the same trade name which we find on other price lists published by the [11] defendants.

These alleged price lists, apparently simply have a small piece of paper pasted over the name "Pyramid Alloy." Out of an abundance of caution, and in view of the fact that these people are still sending out literature as late as February, 1951, with these trade-marks, we felt that they should be included as parties defendant, seemingly being a sales company as opposed to the Technical Porcelain & Chinaware Company as being a manufacturer.

The Court: The exhibits have to do with the retarding of sales. They, like many others, have found it necessary to reduce forces and eliminate that which is not absolutely necessary, and they are removing the Pyramid Alloy Manufacturing Company as of August 1, 1949, is that correct?

Mr. Hardy: That is correct, Your Honor, and I can explain this: These stickers are for placing over that Pyramid Alloy name on these price lists. They are using up their old price lists, to be sure. Any that got out without that ticker on them are pure accident, and we do not know of any. So far as we know no one has removed them, or no one has sent out any of these price lists without the stickers.

Mr. Miketta: May the Court please, in order to simplify it, perhaps Your Honor would consider granting the motion to dismiss as to Pyramid Alloy

Manufacturing Co., subject to reinstatement in the event findings or proof indicate they are [12] still in business, as we believe they are.

The Court: Is that satisfactory?

Mr. Hardy: Do you include the individuals with it?

Mr. Miketta: It is a partnership. Dun & Bradstreet reports show they are still in business.

Mr. Hardy: That is not the fact, and I am telling Your Honor, what the fact is.

Mr. Miketta: Subject to your explanation, and subject to reinstatement in the event the facts prove otherwise.

Mr. Hardy: That is perfectly satisfactory.

The Court: It will be dismissed as to Pyramid Alloy Manufacturing Co., subject to this condition, that if the facts prove otherwise, that they are in business, they may be reinstated as parties defendant.

Mr. Miketta: Thank you, Your Honor.

Mr. Hardy: In the very brief time I have had to analyze this mass of paper, including the complaint, the exhibits, and the motion for temporary restraining order I have analyzed as best I could the alleged acts of unfair competition which are set forth in these documents. I have stated to Your Honor that counsel admits that the trade-marks involved in this case, which are, one, "Shadowleaf"; two, "Tweed"; three, "Hibiscus"; and four, "Magnolia," are not registered either in United States Patent Office or the State of California. Plaintiff alleges ownership of these trade-marks, and it

charges [13] that these trade-marks have been infringed by the defendant 'Technical Porcelain & Chinaware Co., which I will refer to as Tepco, Your Honor, to save that mouthful of words on chinaware. Now, since these marks are not registered, there is no *prima facie* ownership in the plaintiff. These words, and particularly the words, Hibiscus and Magnolia, are entirely descriptive. They describe the designs. Here is a sample. That is not produced as an exhibit in the plaintiff's case, but that design, Your Honor, is just merely a reproduction of what it is, a hibiscus, a hibiscus blossom. It is not capable of exclusive appropriation. That is a Tepco product. There is the Magnolia pattern. That is just what it says a magnolia blossom. It is not capable of exclusive appropriation by anyone. So as to ownership, there is no *prima facie* ownership of any of these marks in the plaintiff, therefore there is a very heavy burden of proof to show ownership which goes far beyond any supposed adoption and use of it.

Before I leave the trade-mark infringement point, I want to call Your Honor's attention to a decision by Judge Roche, with which undoubtedly Your Honor is familiar. It is the case of Dollcraft versus Nancy Ann Storybook Dolls. In that case both of the parties, the plaintiff and the defendant, made dolls. The defendant was in a stronger position in this case because it has registered trade-marks for these dolls on names Little Red Riding-hood, Little Bo-Peep, Little Miss [14] Muffett, Mistress Mary, Curlylocks, Goldylocks, and such.

Judge Roche held in that case each doll of such name is a manifestation of a fictional character itself whose name served to identify and describe the doll. The name served, too,—I am not quoting now—the name served to identify and refer to the very product itself.

Then Judge Roche goes on, “These names are so applied are descriptive. Their use belongs to everyone, and Nancy Ann cannot be given the right of their exclusive appropriation.” I say these names such as Magnolia, and Hibiscus are names that belong to everyone. They are not capable of specific appropriation.

The Court: Was that case one in which preliminary injunction was sought against the Nancy Ann people?

Mr. Hardy: This decision that I read to you from was on final hearing.

The Court: That was upon the trial of the merits.

Mr. Hardy: That was on the trial of the merits, but the subject matter there was trade-marks which were registered. They are not registered in this case. So it was even a stronger case than that presented by the plaintiff here, and still the Court did not grant any relief because the names themselves were not capable of specific appropriation as trade-marks.

The next thing that is alleged is that plaintiff owns certain designs. These designs are said to be the “Shadowleaf” [15] pattern, a “Tweed” pattern, a “Hibiscus” pattern, and a “Magnolia” pattern.



It is not set out in this motion just how they own those designs, collectively or individually. Ownership at common law can be protected in advance of publication or use. After that there is statutory protection for ownership. The only kind of ownership recognized in designs after or upon publication and use is copyright. None of the plaintiff's designs are copyrighted and counsel admits this. So that the statutory form of ownership is not in this case. The other and only other statutory form for ownership is by design patent. Now, a design patent must be applied for within one year after the first public sale and use. That already has gone by, by the admissions in the complaint. So that not only did the plaintiff not secure ownership of those designs by design patent, but he can't now do so because the statutory period has gone by. So there is no basis for ownership for these designs.

Now, it is elemental that if a design if publicly used, and this or any other form of artistic or literary work goes out without the statutory protection, it then goes into the public domain and is available for everyone. The only other thing that you cannot do after that is to palm your goods off as the make of someone else, and that was not done in this case and it never has been done. There is no allegation that it was done. So there is no ownership in these so-called designs in this case. [16]

The third point of alleged unfair competition is that the defendants have conspired with one another, and that "other" seems to be a little vague. It is identified in certain of the affidavits as a photo en-



graveing house in Los Angeles, and through this other person or firm, I don't know which it is, conspired to use and duplicate the designs that plaintiff claims are being unfairly referred to. Now, there is no substantiation of this in the affidavits whatever. The affidavits of Arthur Pagliero and Antone Pagliero specifically deny each and every detail. There is no statement to the effect, in any of the affidavits, that this so-called employee violated any confidence. That is a requisite for unfair competition. There is no allegation that he even did anything torteious, if you say he did copy it, which he did not, and there is certainly nothing tortious if you say he did copy it, which he did not, and there is certainly nothing tortious in whether the plaintiff knew about the defendant's operations. So there is nothing in these affidavits to support this, and I have here in Court, I believe, Mr. Messerschmitt, who made the rolls on which china is produced for the defendant Tepco.

The fourth and last allegation of unfair competition is that the defendants have copied the color marking and arrangement of plaintiff's shipping containers. The shipping containers are not in evidence. They have taken a photostat of one side of the shipping containers, and they appear as Exhibits 6 and 5. Exhibit 6 is attached to the motion for preliminary injunction, [17] and I believe Exhibit 5 is attached—they are both together. They are attached to the complaint. Now, anyone who can read cannot confuse those two shipping containers. It states very distinctly on Exhibit 6 that it is from Tepco China Company. The rest of the mate-

rial on that page is merely a form to identify what it is in the container, which is commonly used in the trade by all manufacturers. You have to have some means of identifying. It is simply a form. If there is no unfair competition involved in a case like that. The only thing there is where it comes from. On the one hand, on Exhibit 5, it states it comes from the Wallace China Company, which is the plaintiff, and on Exhibit 6, it says that it comes from Tepco China, El Cerrito, California, and that is all.

Now, as I indicated earlier, Your Honor, I think there is a very serious doubt as to the jurisdiction of this case. The case of *Stauffer versus Exley*, 184 Fed. 2d 962, was a decision by our Ninth Circuit under the Lanham Act, and in this case it holds, and I believe for the first time—at least my research to date indicates that it is the only case that so holds—that this Act confers original jurisdiction on the District Court in actions for unfair competition in the absence of diversity of citizenship, where there is no substantial and related claim under copyright patent or trade-mark of laws joined to such actions.

That, Your Honor, is a very sweeping decision. My own [18] feeling is the Court of Appeals was sold a bill of goods and I think, if I had time to research this, I could persuade Your Honor that the Ninth Circuit was sold a bill of goods. I realize that is the law of this case. We have to face it. But I think also in this case, the *Stauffer* case there was a distinguishing feature. In that case the

Stauffer exercise system was involved and the defendant set up a similar course and called it also Stauffer. Now, there is some basis for trade-mark protection there, and I believe that a careful reading of that Stauffer versus Exley case will show that the Court insisted upon some ownership of a trade-mark before it acquired jurisdiction in the case. Now we have no ownership of trade-mark, we have no subject matter which is capable of ownership as a trade-mark. These names belong to the public. The possible exception to that is the trade-mark "Tweed." There is the "Tweed" pattern. That is a Tepco product. Now, that "Tweed" pattern has been used by Tepco prior to 1941, which is more than six years prior to the first date that the plaintiff alleges use and ownership of such a trade-mark, so that their complaint entirely fails with respect to the trade-mark "Tweed." And on the same theory Tepco has a cause of action against the Wallace Chinaware Company for copying the name "Tweed" and copying the "Tweed" design.

If your Honor would care to look at this, I can show you a price list of Tepco porcelain dated April 22, 1941, in which [19] the product Tweed is listed thereon in the next to the bottom item on that price list. I have not had time to have copies of that made; otherwise I would have had copies here present for counsel, and I would be glad to show it to them.

Mr. Miketta: In whose affidavit does that appear?

Mr. Hardy: Mr. Antone Pagliero's.

The Court: I have some other matters to take up, gentlemen.

Mr. Hardy: We heard Mr. Miketta state that I had not denied or I had ignored certain of the allegations in the complaint. And now Mr. Antone Pagliero's affidavit, as well as his brother Arthur Pagliero's affidavit, are complete denials of everything in the complaint, in the affidavits in so far as they have individual knowledge.

I might say I should refer Your Honor's attention to the fact that the two Paglieros and the Tepco Porcelain Company, or the Technical Porcelain & Chinaware Company, are old established businesses, is an old established business. It was founded originally by the father in 1910. Both of these boys were literally born in this business. The Tepco Porcelain Company has its start as such in 1920. Mr. Antone Pagliero, then at the age of 14, went out to sell these hotel china products, and has been in charge of sales almost up to the present time. He has an intimate personal knowledge that is not equalled by anyone on the plaintiff's side. His brother Arthur Pagliero [20] also was literally born in this business. They have been with it as boys. It is a family enterprise. They started in when they were old enough to handle a mould or a piece of clay. Their business has succeeded and prospered accordingly because of their knowledge. It is not a fly-by-night thing.

I would like to refer to Your Honor's attention paragraph six particularly of the affidavit of Mr. Antone Pagliero, wherein he states, "That it has



been common practice in the industry for several firms engaged therein to duplicate or approximate designs and patterns used by another or other manufacturers and that this practice has been followed by Wallace China Company, Ltd., and Tepco as well as the other manufacturers, and that the same or similar code numbers or words are used to designate the particular design; for example, L-100 is recognized throughout the industry as a "Pin Line Decoration," and I have the price list, which I have not had time to reproduce, but which I can show Your Honor, both from Technical Porcelain and Wallace China, to show that that same number has been used for that particular design.

"L-101 is a Marigold Decoration, L-104 is a Green Band and Line." All manufacturers use that. "Tepco identifies its products by such references and so does Wallace China Co., Ltd. While Tepco has never followed the policy of having exclusive distributors, this situation as well as the fact that it is common practice for manufacturers of similar designs such as [21] Tepco "Mohawk" and Wallace Co., Limited's "Del Mar" patterns brought about the writing of the letter dated September 13, 1937, by the then sales manager for Wallace China Co., Ltd., to Smiths Hotel and Bar Supply Co., of San Diego, the said letter being given this affiant by Mr. R. W. Smith of the said Supply Company. The letter clearly recognizes that the copying and simulation of designs for vitrified hotel ware as early as 1937 were so close that the dealer could



mix two lines when filling an order. I have not had a chance to reproduce that letter, Your Honor, but here is the original letter dated September 13, 1937, and in this letter among other things it states—I start in the middle of the second paragraph—

Mr. Miketta: If the Court please, this goes back to 1937. It seems to be totally irrelevant and immaterial to the primary issue here. I do know what is involved in this. Of course, Mr. Pagliero in his affidavit states that in his opinion it is general practice to copy patterns. Well, maybe it is in his opinion, but just because he thinks it is a proper thing to do does not affect the equities here, and what happened back in 1937 in some letter written by a Mason Hooser about something else does not seem to be pertinent. We are taking up Your Honor's time unnecessarily.

Mr. Hardy: Mr. Miketta, do I understand that you do not recognize this as an original letter from the Wallace China Co., [22] the plaintiff in this case, written by defendant's sales manager?

Mr. Miketta: I am not saying that. It may be an original letter.

The Court: His objection is that it is too remote.

Mr. Hardy: I am showing by this letter, Your Honor, it was common practice.

The Court: I will allow you to read it.

Mr. Hardy (reading):

“You were at the time buying another line of china in addition to ours, and we pointed out to you that it would be rather difficult in our

opinion for you to give enough business to both factories to make your account particularly attractive to us. It has been our experience that when a dealer handles both our line and the other line in question, he mixes the two lines when filling orders and this reacts against the reputation of our china by reason of that fact that oftentimes the restaurant man thinks that it is our line that is breaking up so rapidly when in truth it is the other line."

I point that out to Your Honor to show that it was not a copying of the designs that they were complaining about. It was the quality of the merchandise, and that that has been a practice all along.

I have here two pieces of chinaware, this hotel chinaware we are talking about. Those have been in open competition on [23] the market for a long time. One is made by Tepco and the other is made by Wallace. I defy anyone without a microscope to tell me *that* differences in those two designs are.

Now, there is a good reason for having the several businesses in this line of work reproduce designs of another manufacturer or simulate designs of another manufacturer. That is particularly referred to in paragraph eight of Mr. Pagliero's affidavit.

The Court: That is Antone.

Mr. Hardy: Antone Pagliero's.

"Copying and simulation of designs has grown up in the industry because of public demand. For example, a restaurant may be

completely supplied with a design for vitreous hotel ware made by Wallace China Co., Ltd., or any other manufacturer and some dispute or disagreement may arise with the local distributor or dealer for that manufacturer. The customer wants to get lines and ware which will fit in with his then pattern from another source and it may very well be that a dealer or distributor for Tepco would say he could get this order if the pattern can be duplicated or simulated, which is done. The customer and the public are happy because they are not bound to a single source of supply which could hold them up as to price, delivery or any other reason which would make competition impossible. The practice of copying and simulation of designs was well established in this industry and its practice [24] is fully justified and accepted in the trade, with the public getting the benefit. Such copying and simulation of designs in this trade is limited to unpatented and uncopyrighted designs as statutory rights are respected by all manufacturers."

And that is true, Your Honor. The public gets the benefit.

What that plaintiff is asking this defendant to do at this time is to enter into a conspiracy in restraint of trade to help him secure a monopoly on a line of ware and a design to which they are lawfully entitled and to which the industry itself over a period of time has permitted an open and free competition.

Now, the only thing I have not been able to answer in these affidavits is the conspiracy charge. That conspiracy is said to arise from the employment by Tepco of a former employee of Wallace Chinaware. That, I say, is a misrepresentation of the fact. We have Mr. Messerschmitt here in the courtroom. I have not been able to interview him with any degree at all, but I am perfectly willing to put him on the stand now and ask him the questions to deny those statements and state to Your Honor what the facts are.

The Court: All right, put him on.

DALE J. MESSERSCHMITT

was called as a witness on behalf of the defendants, and being first duly sworn testified as follows:

The Clerk: State your name for the record. [25]

A. Dale J. Messerschmitt.

Direct Examination

By Mr. Hardy:

Q. Mr. Messerschmitt, where do you live?

A. Whittier, California.

Q. In Whittier, California. What is your occupation?

A. Photo engraver.

Q. With whom are you associated?

A. The Garnier Engraving Company.

Q. Where are they located?

A. Los Angeles.

Q. Does your photo engraving company, Garnier

(Testimony of Dale J. Messerschmitt.)

Engraving Company, practice any specialty in photo engraving?      A. Yes, we do.

Q. What is that specialty?

A. Cylinder engraving.

Q. In other words, you make engravings for the pottery industry?

A. Pottery and Continental Can Industry, and other types of cylinders, too.

Q. Do you hold out your services to entire pottery industry?      A. Yes.

Q. Have you ever been employed by the Wallace Chinaware Co.?      A. No.

Q. You never have been employed?

A. No. [26]

Q. Have you ever been employed by Tepco?

A. No.

Q. Does the Garnier Engraving Co. make cylinders for the plaintiff, Wallace China Co., Ltd.?

A. Yes, we do.

Q. Does it also make cylinders for other pottery companies?      A. Yes.

Q. Could you name one or two of those?

A. Vernon Kilns.

Q. Where are they located, please?

A. Vernon, California.

Q. Any other?      A. And Tepco.

Q. You have made cylinders for Tepco, the defendant here?      A. Yes, we have.

Q. Have you ever made cylinders for Tepco using other than original art work supplied by Tepco?      A. Never.



(Testimony of Dale J. Messerschmitt.)

Q. Have you ever copied a design of any other of your clients for Tepco? A. No, never.

Q. Did the Wallace Chinaware Company teach you your trade? A. No.

Q. You did not learn your trade from the Wallace Chinaware Co?

A. No, we did not. [27]

Q. Did they teach you about cylinder engraving?

A. No.

Q. To your knowledge were they the originators of cylinder engraving methods? A. No.

Q. You know of your own knowledge that that is many years old?

A. Yes, very many years.

Mr. Hardy: I think that is all for Mr. Messerschmitt.

Mr. Miketta: May I examine him?

The Court: Yes.

### Cross-Examination

By Mr. Miketta:

Q. Mr. Messerschmitt, do you mean to state that the Garnier Engraving Company has never done any engraving work for Wallace China Company?

A. We have never done work? Yes, we have.

Q. You have? A. Yes.

Q. Over what period of time?

A. I believe since 1944.

Q. How long have you been with Garnier?

(Testimony of Dale J. Messerschmitt.)

A. I came with Garnier in 1941. I went into the service and came back in 1946.

Q. Mr. Garnier is the senior partner, is he not?

A. That is right. [28]

Q. In the manufacture of these cylinders Wallace would bring you a black and white drawing first, is that correct? A. That is correct.

Q. Then that would be photographed and etched onto a metal cylinder, is that correct?

A. Correct.

Q. I hand you a sheet which has been pasted on the backing. Do you recognize that?

A. Yes.

Q. What is that? A. That is a pattern.

Q. Is that a print, you may say, taken from one of the rollers? A. Yes, I would say so.

Q. And you recognize the pattern by name?

A. Yes.

Q. What is it?

A. I would say it is called "Shadowleaf."

Q. Is that the Wallace "Shadowleaf"?

A. No, this is not.

Q. That is not? A. No.

Q. How can you tell the difference?

A. Well, there is enough difference in the work that I can recognize it. There is a back stamp which shows Tepco.

Q. So the word "Tepco" actually appears on that pattern, does [29] it not?

A. That is right.

(Testimony of Dale J. Messerschmitt.)

Mr. Miketta: May I have this marked, please for identification? May it be marked as Plaintiff's Exhibit 1, and should like to offer it in evidence, in view of the fact that it has been identified.

The Court: It may be received.

(The print referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Miketta): Mr. Messerschmitt, do you have any idea of when the cylinder from which this print has been made was made by you?

A. Approximately.

Q. When would that be?

A. About near the end of 1949.

Q. About the end of 1949. Prior to that time you had made similiar cylinders of this "Shadowleaf" pattern for Wallace, did you not?

A. Yes.

Q. I show you a transfer sheet, this one being in green, and ask you if you can recognize that?

A. Yes, I can.

Q. Will you please state what that is.

A. That is called a "Shadowleaf" pattern of Wallace's.

Mr. Miketta: May I have that marked, please as Plaintiff's [30] Exhibit No. 2?

(The print referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

(Testimony of Dale J. Messerschmitt.)

Q. Now, it is customary after the cylinder has been etched to send these cylinders out to the Hard Chrome Company, is that it?

A. That is correct.

Q. And they chromium plate it, is that correct?

A. That is right.

Q. Do you recall that the cylinder that you had made for Tepco was accidentally sent by Hard Chrome Company to Wallace instead of to you or to Tepco?

A. Yes, I recall.

Q. When you lay Exhibit 2, which is the Wallace pattern or the Wallace transfer from a cylinder, over the Exhibit 1, which is the transfer or pattern taken from the Tepco pattern, don't you find that they are practically identical?

A. They are very similar.

Q. I call your attention to the manner in which the leafs along the left-hand edge seem to blend with the underlying pattern on Exhibit 1. Is that just happenstance, Mr. Messerschmitt?

A. Yes, I would say it is.

Q. In your opinion that is happenstance?

A. I would say that a duplication of that pattern is very [31] close.

Q. And this pattern includes the large white leaves?

A. That is right.

Q. Which are arranged similarly, are they not?

A. Right.

Q. And the large white leaves occasionally have little white tendrils as indicated in the lower right-

(Testimony of Dale J. Messerschmitt.)

hand corner and the upper right-hand corner, is that correct, on both of them?

A. That is right.

Q. And in both instances you have a background of diagonal lines, have you not?

A. It has to have a diagonal line. That particular art work calls for that.

Q. In both instances there are background leaves of a darker shade than the farthest background, is that true?

A. That is true.

Q. And those background leaves are identical in form and contour on the Tepco, as Exhibit 1, as they are on the Wallace sheet?

A. They are similar in nature, yes.

Q. Do you recall from whom you obtained the master from which you made the cylinder for Tepco "Shadowleaf" pattern, Exhibit 1?

Mr. Hardy: You mean the original art work.

The Witness: The original art work? I believe it was from the Tepco Company. [32]

Q. (By Mr. Miketta): Do you have a clear recollection from whom you received it?

A. It was either the Tepco Company or the artist.

Q. Do you know the name of the artist?

A. Yes, I do.

Q. May I have it, please?

A. William Richardson.

Q. Where does he live?

A. I believe in Los Angeles.



(Testimony of Dale J. Messerschmitt.)

Q. Is he the same Mr. Richardson who was employed by Wallace China Company?

A. I believe he has been, but he has been free-lancing for quite a few years.

Q. But prior to the time that you received the model from which you made the cylinder represented by the transfer, Exhibit 1, you know that Mr. Richardson was employed by Wallace China Company?

A. Free lancing, yes.

Q. And he was employed by them for art work, is that correct?

A. That is right.

Mr. Miketta: I do not see that anything else is to be gained, your Honor.

### Redirect Examination

By Mr. Hardy:

Q. I have two or three questions to ask you, Mr. Messerschmitt. I show you a tear sheet from the publication [33] "Pottery and Glass" for January, 1950, and ask you if that illustrates the kind of cylinder to which you referred?

A. Yes, it does.

Q. And it is your job to engrave cylinders of that character?

A. That is right.

Mr. Hardy: I would like to offer this sheet as Defendant's C.

The Court: It may be marked.

(The tear sheet referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

(Testimony of Dale J. Messerschmitt.)

Q. (By Mr. Hardy): You stated that Mr. Garnier was the senior partner of your firm?

A. That is right.

Q. How many partners are there?

A. Two.

Q. Are you the other partner?

A. That is right.

Q. Has Mr. Garnier been active in the business in the past several years?      A. Not lately.

Q. By lately, you mean how long?

A. About three years.

Q. You have been making the engravings for the past three years, is that correct?

A. Longer. [34]

Q. Longer than that?      A. Yes.

Q. I believe you said that you got the original art work for the Tepco "Shadowleaf" design there from Tepco or from Mr. Richardson?

A. That is correct.

Q. You can't recall which it was?

A. I am not sure.

Q. But you did not get it from Wallace?

A. No.

Q. And you did not use a Wallace roller?

A. No, definitely not.

Q. And you did not supply Mr. Richardson or Tepco with any print of the Wallace cylinder?

A. Definitely not.

Q. You have stated also it was your recollection that Mr. Richardson had formerly been employed

(Testimony of Dale J. Messerschmitt.)

by Wallace Chinaware Co. Do you know what his employment was at that time?

A. He has free lanced for a few of the potteries for the last few years.

Q. So you mean he had free lanced for Wallace Chinaware Company?           A. Yes.

Q. As well as Tepco?           A. Yes.

Q. As well as other potteries? [35]

A. That is right.

Q. Do you know where Mr. Richardson is now?

A. I believe he is in the East.

Q. Have you tried to contact him at all?

A. Not for several weeks.

Mr. Hardy: Those are all the questions that I have.

Mr. Miketta: I do not think Mr. Messerschmitt is on trial here.

The Court: Step down.

Mr. Hardy: I do not think Mr. Messerschmitt is on trial either. I just want to get the fact to show there is no conspiracy. I think it is very evident from Mr. Messerschmitt's testimony. They certainly have not sustained the burden of proof required by the allegations in their complaint that we had entered into a conspiracy to use the designs of the plaintiff.

The Court: What else have you?

Mr. Hardy: I would like to point out one further thing on this, your Honor. I have not taken up Arthur Pagliero's affidavit in this case, which goes primarily to the quality of the work. The

quality and reputation of the firms I think is a standoff. I do not think anyone could claim any more purity than the other. I think they are both reputable concerns. They have met in competition before, and why this lawsuit was brought about I have no real basic understanding. But I do want to point [36] that the only urgency alleged in this motion for a temporary injunction is the imminency of the exhibition in Texas. That has entirely disappeared. Therefore there is presently no possible basis for the Court granting a temporary injunction prior to the trial of the issue in this case. There isn't any denial of that. They allege only one thing, the imminency of this case. That has been entirely abandoned by Mr. Miketta, and it just washes out completely. So that there is no basis now, no urgency for the granting of this extreme relief, and the tying up of a business in advance of the proof of the facts. I would like at this time in concluding to offer the exhibits that have been referred to during the course of my comments here and that have been referred to in the several affidavits.

The Court: They will be received and appropriately marked.

Mr. Hardy: May I have these marked, your Honor? In the affidavit of Arthur Pagliero he has referred to the overall pattern made by the Mayer China Company of Beaver Falls, Pennsylvania. I think Arthur Pagliero states in his affidavit that that overall pattern has been known and used for many years, and we are attempting now to get the

catalogue and the exact date when that pattern was first used. There is an allegation in here that the overall patterns were invented by Wallace Chinaware. That is sheer fabrication. That is not true, and it can be proved beyond any reasonable doubt. This exhibit I would like to offer as Defendant's Exhibit B. [37]

(The pattern referred to was thereupon received in evidence and marked Defendant's Exhibit B.)

Mr. Hardy: I would like also to offer the Tepco China dish of the Magnolia design which is known as Dixie in the Tepco line as Exhibit D.

The Court: It may be received.

Mr. Hardy: I would like to offer the Tepco plate of the Hibiscus design which is also known as Hawaiian as Defendant's Exhibit E.

(Thereupon the plate referred to was received in evidence and marked Defendant's Exhibit E.)

Mr. Hardy: I would like to offer the Tepco plate with the Tweed design, which our Honor will recall has been sold for over ten years by Tepco, as Defendant's Exhibit F.

(Thereupon the plate referred to was received in evidence and marked Defendant's Exhibit F.)

Mr. Hardy: I would like to offer the Wallace Chinaware cup which is sold under their designation design as Del Mar as Defendant's Exhibit G.



(Thereupon the cup referred to was received in evidence and marked Defendant's Exhibit G.)

Mr. Hardy: I would like to offer in evidence Tepco China design "Mohawk" as Defendant's Exhibit H.

(Thereupon the object referred to was received in evidence and marked Defendant's Exhibit H.) [38]

Mr. Hardy: I would like to offer the original letter of Wallace China Co., Ltd., dated September 13, 1937, as Defendants' Exhibit I and ask leave to substitute photostatic copies thereof, as this is the only I have and I will supply counsel with copies.

The Court: Very well.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit I.)

Mr. Hardy: I would like to offer the Tepco discount sheet of April 22, 1941, to which I have referred, as Defendant's Exhibit J.

(The discount sheet referred to was received in evidence and marked Defendant's Exhibit J.)

Mr. Hardy: I would like also to offer the Wallace China Co., Ltd., discount sheet of January 15, 1942, as Defendant's Exhibit K.

(The discount sheet referred to was received in evidence and marked Defendant's Exhibit K.)

Mr. Hardy: And I would like at this time to offer the Federal specification for vitrified china-ware, which defines hotel china, and which is referred to in the affidavits, it being Specification MC 301 a in which, or to which all makes of vitrified china of this character conform.

The Court: It may be received.

(Thereupon the document referred to was received in evidence [39] and marked Defendant's Exhibit L.)

Mr. Hardy: Your Honor, inasmuch as I do not have duplicate of these discount sheets, I would like also to withdraw these and make photostatic copies and substitute a photostatic copy thereof, and I will furnish counsel with copies. They are the only ones we have.

The Court: I want to see those this afternoon.

Mr. Hardy: I mean when you are through with them, your Honor, I would like to withdraw them.

The Court: You may.

Mr. Hardy: That concludes my presentation.

Mr. Miketta: Your Honor, I will try to be as brief as I possibly can. Is your Honor interested in this question of jurisdiction?

The Court: No.

Mr. Miketta: I think that *Stauffer versus Exley* is very clear. Our whole case has been prepared following strictly the requirements laid down by the Ninth Circuit in that case. It is interesting to note that there has been nothing stated in these

affidavits which we have read very carefully which contradict the necessary allegations. They do not contradict that they copied the pattern or the patterns, rather. They can't. They do not deny that they used those names and shipments in interstate commerce—and that is important because it has to be commerce regulated by Congress—whereas our complaint [40] makes the necessary allegations which are substantiated under oath. I do not know the purpose of having Mr. Messerschmitt appear here today except that in our complaint we stated that Garnier, who has made our cylinders for many years, now makes the same cylinder for Tepco. Mr. Messerschmitt admitted it. Exhibits 1 and 2, and your Honor has been able to compare them closely by this time, show that they are identical.

Incidentally, for your Honor's information, after a cylinder is made it is printed on this thin paper in the desired color and then girls cut the piece out and lay it on the chinaware that is to be decorated. Then the chinaware is burned, and during the burning the paper disappears and the color is fixed on the china. That is one of the reasons why they make it. I thought your Honor would be interested in that.

We are not interested in the normal white chinaware, hotel ware with normal painting, the common ordinary garden variety of china that they make, and a lot of people make, and the mere fact that there is a letter written in 1937 about some other china—not these patterns—has nothing to do with this case. White china is white china, but when a

man puts out china which has a distinctive trade name, and which has a distinctive pattern, and that goodwill is developed in the pattern, and then another man comes along and uses the same name and the same pattern, he is stealing, and the Courts [41] have held that to be stealing. So far as names are concerned, they do not like our photostats that are attached to the affidavit in the complaint. The photostats are small reproductions of these actual carton sizes, and your Honor will notice that they have been printed by Tepco in blue in the same arrangement and arranged for marking in the same manner. As a matter of fact, that appears on a large number of packages and appears in the same way. Why did they have to select blue and use the same arrangement? Of course, their name appears on there. That does not save them at all, your Honor.

There is one very fine case in our memorandum. It is on page 12, and I think the language is almost identically applicable. That is Enterprise Manufacturing versus Landers, Frary and Clark, a well written Second Circuit case, and the Court there stated, 131 Fed. 240 et 241, "This is a most aggravated case of unfair trading. Usually in these cases the defendants so dress their goods as to present a number of points of difference, on which they rely when charged with intent to deceive; insisting that, although there may be resemblances, the differences are so great as to preclude any idea that they had sought to produce confusion. Here, on the contrary, they have not only conformed their



goods to complaint's in size and general shape, which was to be expected, but also in all minor details of structure—every line and curve being reproduced, and superfluous metal put into the driving wheels [42] to produce a strikingly characteristic effect—while the goods are so dressed with combinations of color, with decorations reproduced or closely simulated, with style of lettering and details of ornamentation that except for the fact that on the one mill is found the complaint's name, and on the other the defendant's, it would be very difficult to tell them apart. It is elementary law that, when the simulation of well known and distinctive features is so close, the Court will assume that defendants intended the result they have accomplished, and will find an intent to appropriate the trade of their competitor, even though in their instructions to their own selling agents they may caution against oral misrepresentations as to the manufacture of the goods.”

I call attention to that case because we have the word “Wallace” on the back of our plates, and they do——

Mr. Hardy: In all instances?

Mr. Miketta: Except on some small plates.

Mr. Hardy: That is right.

Mr. Miketta: That is not enough. People buy by pattern, by name; they recognize that by name. The trade names have been used as shown by our exhibits on the containers, on the price lists, by word of mouth. They have copied our patterns—I am not going to burden the record with any more



actual plates, but here is a comparison, your Honor. One of these is ours and one of these is theirs. Now, that is a distinctive pattern, and what [43] happened is this: We originated this pattern a good many years ago. Tepco copied it for a while and then gave it up, and did not copy it for a number of years. Recently they have started recopying it, and by golly we are including it in this cause of action because we should, but as far as origination is concerned, we originated that pattern. There is not a single denial in any of these affidavits that we did not originate these patterns, except that generalized statement that everybody copies patterns that we did not originate the general idea of having an overall pattern, which I think is a little beside the point.

A preliminary injunction should be granted, your Honor, because trade-marks, trade names, reputation, goodwill are at stake here, and we do have the verified—will, Mr. Wood's affidavit not denied by the defendant that Mr. Pagliero did threaten the plaintiff with flooding the market with these copies at a greatly reduced price if we brought this action. Now, that statement was made before, but after notice had been given them.

Mr. Hardy: When was that statement made, Mr. Miketta?

Mr. Miketta: That statement was made prior to May 25th, which is the date of the Wood affidavit.

Mr. Hardy: Subsequent to when?

Mr. Miketta: Pardon?

Mr. Hardy: Subsequent to when? [44]

Mr. Miketta: Subsequent to the time that we sent the notice on May 5th. Your Honor, we have those expositions coming up. We have this threat of flood of copies. We have my client's reputation, and as the Courts have pointed out, reputations are easily broken, and preliminary injunctions are about the only way you can save them. They are doing exactly what this Court stated—this is the Sixth Circuit—in *Garrett and Sons versus T. H. Garrett and Co.*, 78 Fed. 472 et 479, "If the complaints be not protected by preliminary injunction against such use—in other words, that question be postponed to the final hearing—there is every inducement to the defendant to delay and prolong the litigation, continuing meanwhile the assaults upon the goodwill of the complaints, so that, even if final decree be at last rendered in favor of complaints, the goodwill will have been so seriously and irreparably injured, if not to a great measure destroyed, as to leave the complaints practically without remedy."

We are in that position. Unless we get a preliminary injunction, and the proof is before your Honor—the proof is clear; it is definite, and there is no denial of the essential fact—if we do not get this preliminary injunction, then the defendant, as he has already tried to this morning, will delay and prolong the litigation, and in the meantime our goodwill, our reputation, the value of our trademark, the value of these patterns will have been destroyed. [45]

The Court: All right, gentlemen. The Court is

apprised of the situation. I will get at this as soon as I can this afternoon.

Mr. Miketta: Thank you, your Honor. I think the authorities have been well presented by the memorandum.

Mr. Hardy: Your Honor, may I ask your indulgence for just a moment? We have not answered in detail this so-called threat because in the pleadings it does not say when the threat was made. For the first time, just a few moments ago, we learned from Mr. Miketta that it was made or said to have been made between May 5th and May 25th of last month. I have Mr. Pagliero here, who will deny that, and deny that he saw Mr. Kenneth A. Wood.

Mr. Miketta: He did not see him. He telephoned him. That was by telephone.

Mr. Hardy: Is there a recording of that telephone conversation?

Mr. Miketta: May the Court please, those are the tactics that are going to be used——

The Court: I will assume if you put him on the stand he would deny it.

Mr. Hardy: I would like to do so, your Honor, because it is not true.

Mr. Miketta: I would like to have him confronted by Mr. Wood. [46]

The Court: I do not know about that. I say I would assume if you put your client on the stand he would deny it.

Mr. Hardy: As an honorable person under oath he would tell the truth.

The Court: I am not saying he would or would not.

Mr. Hardy: So I resent Mr. Miketta's inferences here that Mr. Pagliero was not an honorable person.

The Court: The Court did not get any such inference. I am not assume Mr. Pagliero is a dishonorable man. There has been nothing to suggest that here. The Court does not take any such inference. I am only concerned with the legal issue. I am not concerned with personalities or anything else; I am only concerned with what I am confronted with here, and you have both very ably and proficiently apprised me of the problem I have before me, and the matter will now stand submitted.

(Whereupon the matter was submitted.)

#### Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 47 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ JOSEPH J. SWEENEY.

[Endorsed]: Filed September 17, 1951.



[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD  
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled matter and that they constitute the record on appeal herein as provided in the designation filed by the attorneys for the appellant:

Complaint for unfair competition and Trade Mark Infringement.

Motion for preliminary injunction.

Order to show cause.

Affidavit of Antone Pagliero (re Pyramid Alloy Mfg. Co.).

Affidavit of Arthur Pagliero.

Affidavit of Antone Pagliero.

Order dismissing action as to Pyramid Alloy Mfg. Co.

Order for preliminary injunction.

Findings of Fact and Conclusions of law.

Judgment.

Notice of appeal.

Motion for supersedeas and stay of execution.

Order granting supersedeas.

Supersedeas bond.

Appellants' designation of record on appeal.

Reporter's transcript (witness Dale J. Messerschmitt).



Concise statement of Points of Appeal under Rule 75 (a).

Plaintiff's Exhibits 1 and 2.

Defendants' Exhibits B to L.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 6th day of September, 1951.

[Seal]                      C. W. CALBREATH,  
Clerk.

By /s/ C. W. CALBREATH,  
Deputy Clerk.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the accompanying documents, to wit: Reporter's Transcript, June 7, 1951, and Plaintiff's counter-designation of contents of record on appeal, are the originals filed in this Court in the above-entitled case and that they constitute a supplement to the record on appeal herein.

In Witness Whereof I have hereunto set my

hand and affixed the seal of said District Court this 19th day of September, 1951.

[Seal]

C. W. CALBREATH,  
Clerk.

By /s/ C. M. TAYLOR,  
Deputy Clerk.

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[Endorsed]: No. 13094. United States Court of Appeals for the Ninth Circuit. Antone Pagliero and Arthur Pagliero, Appellants, vs. Wallace China Co., Ltd., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 12, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 13,094

ANTONE PAGLIERO, et al.,

Appellants,

vs.

WALLACE CHINA CO., LTD.,

Appellee.

CONCISE STATEMENT OF POINTS UPON  
WHICH APPELLANTS INTEND TO RELY

Pursuant to Rule 19(6) of this Court, Appellants herein below set forth a concise statement of points upon which they intend to rely in this appeal.

1. The Court erred in finding and holding that Plaintiff is the owner of the trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus," and "Magnolia," as applied to hotel china and is entitled to the exclusive use thereof as against these Defendants, although none of them has been registered under any Federal Act or under the Laws of the State of California, and in spite of the complete failure to show they were anything other than descriptive designations for designs.

2. The Court erred in finding and holding that the Plaintiff is the owner of the distinctive patterns identified by the trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus," and "Magnolia" exemplified by Exhibits 3, 9, 11 and 13 ap-

pended to the motion for preliminary injunction, and is entitled to the exclusive right to incorporate said patterns in hotel china as against these Defendants, although none of said patterns has been copyrighted or protected by Design Letters Patent, and the time for doing so has long since passed.

3. The Court erred in finding and holding that the Court had jurisdiction of this cause under the Lanham Act 15 USCA Sections 1051-1127, and under the Paris Convention and the Inter-American Convention.

4. The Court erred in finding and holding that the Defendants by manufacturing, advertising and selling hotel china under the trade names or trademarks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" have infringed Plaintiff's rights therein and have competed unfairly with Plaintiff.

5. The Court erred in finding and holding that the Defendants by copying and imitating Plaintiff's patterns identified by the trade names or trademarks "Shadowleaf," "Tweed," "Hibiscus," and "Magnolia" and exemplified by Exhibits 3, 9, 11 and 13, of record herein, and by manufacturing and selling hotel china incorporating the same, have competed unfairly with the Plaintiff.

6. The Court erred in finding and holding that the Plaintiff is entitled to a preliminary injunction against the Defendants as prayed.

7. The Court erred in finding and holding that the Defendants are guilty of unfair competition even

though there is no passing off of Defendants' products as and for Plaintiff's products and even though the products of both Plaintiff's and Defendants' are clearly marked, each with its own trade-mark and even though it has long been the practice in the industry for manufacturers to copy or simulate designs used by other manufacturers, unless said designs are either protected by Design Letters Patent or copyrighted.

Respectfully submitted,

/s/ HENRY GIFFORD HARDY,  
Attorney for Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 14, 1951.

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[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER DESIGNATING  
EXHIBITS TO BE PHYSICAL EX-  
HIBITS FOR THE RECORD ON APPEAL

It is stipulated by and between the parties hereto through their respective counsel that the following exhibits, whether documentary or physical, need not be reproduced but shall be available as physical exhibits to the Court in connection with this record and may be considered by the Court in their original form as if they had been reproduced in



the printed record, said exhibits being as follows:

Plaintiff's Court Exhibits 1 and 2.

Defendants' Exhibits B to L, both inclusive.

C. A. MIKETTA,

JAS. M. NAYLOR,

By /s/ JAS. M. NAYLOR,

Attorneys for Appellee.

HENRY GIFFORD HARDY,

HAUERKEN & ST. CLAIR,

By /s/ HENRY GIFFORD HARDY,

Attorneys for Appellants.

So Ordered:

/s/ WILLIAM DENMAN,

Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

United States Circuit Judges.

[Endorsed]: Filed September 18, 1951.

